

90-862,①

Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

POWELL DUFFRYN TERMINALS, INC.,

Petitioner,

vs.

PUBLIC INTEREST RESEARCH GROUP OF NEW
JERSEY, INC., FRIENDS OF THE EARTH and UNITED
STATES ENVIRONMENTAL PROTECTION AGENCY,

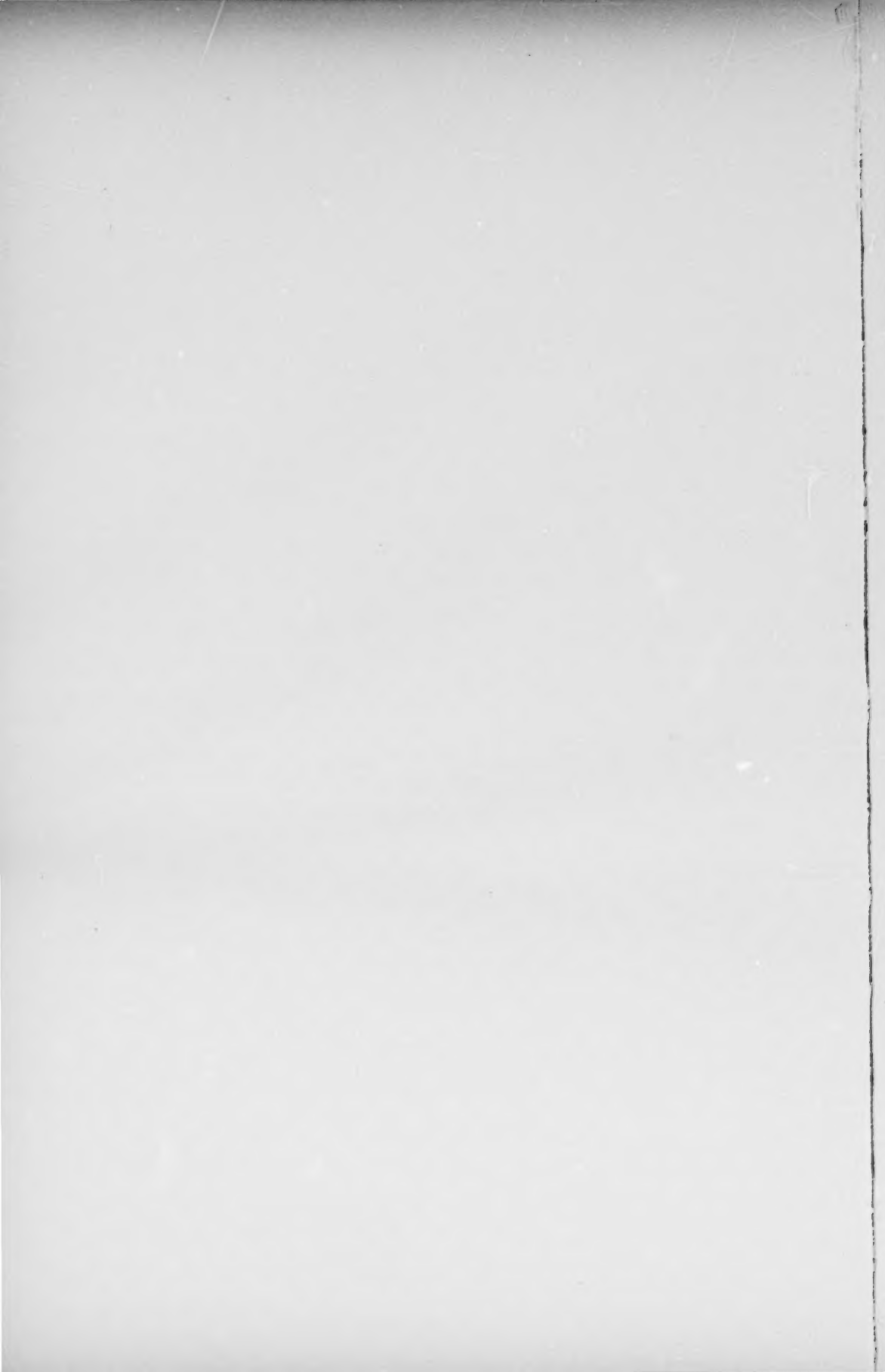
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Article III of the Constitution, a party seeking to invoke the jurisdiction of the federal courts must make a three part showing to establish his standing, including (1) that he personally has suffered some actual or threatened injury, (2) as a result of, and fairly traceable to, defendant's "putatively illegal" conduct, (3) which is likely to be redressed by a favorable decision.¹ In the present case, the court of appeals defined different standards to determine standing for citizen-plaintiffs in Clean Water Act cases, and in doing so upheld plaintiffs' standing in the absence of proof of causation or evidence of redressability.

The question presented is:

Whether the causation and redressability requirements of Article III may be relaxed in citizen suits under the Federal Water Pollution Control Act, to permit an environmental organization to establish standing in the absence of evidence that the injuries complained of by its members are a result of and fairly traceable to the defendant's conduct.

¹ *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

PARTIES TO THE PROCEEDINGS

The petitioner is Powell Duffryn Terminals, Inc., a New Jersey corporation. The respondents are Public Interest Research Group of New Jersey, Inc. and Friends of the Earth. In addition, the United States Environmental Protection Agency ("EPA") intervened in the court of appeals regarding the district court's disposition of the civil penalty and the criteria utilized by the district court in determining that penalty. The EPA is identified in this Petition as a respondent.

In the court of appeals, three proceedings under docket numbers 89-5831, 89-5851 and 89-5861 were consolidated and a single opinion and judgment was issued.

Powell Duffryn Terminals, Inc. is a wholly owned subsidiary of Powell Duffryn plc, incorporated in the United Kingdom.

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**ON PETITION FOR A WRIT OF CERTIORARI
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Petitioner, Powell Duffryn Terminals, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is approved for publication but has not yet been reported. It is appended as Exhibit "A" to Petitioner's Appendix, at pages 1a to 54a.² The opinion of the district court on the question of standing is reported at

² "—a" to "—n" refers to the appendix to this Petition for a Writ of Certiorari. "A—" refers to the joint appendix the parties filed in the United States Court of Appeals for the Third Circuit.

627 F.Supp. 1074 (D.N.J. 1986). 1f to 32f. The opinion of the district court on the issues of civil penalties and injunctive relief is reported at 720 F.Supp. 1158 (D.N.J. 1989). 1b to 21b. A prior unpublished written opinion of the district court, regarding certification under 28 U.S.C. §1292(b), is appended as Appendix "E" (1e to 1le), and a separate oral opinion of the district court granting plaintiffs' third motion for summary judgment is appended as Appendix "C" (1c to 4c).

JURISDICTION

Respondents brought suit in the district court alleging jurisdiction under 33 U.S.C. §1365. Petitioner filed a motion to dismiss for lack of subject matter jurisdiction under Article III, which was denied by the district court on January 13, 1986. 1f to 32f.

Petitioner appealed, and the court of appeals affirmed in relevant part on August 20, 1990. (1a-54a). Jurisdiction in the court of appeals was established under 28 U.S.C. §1291. A timely-filed petition for re-hearing by respondents was denied by the court of appeals on October 11, 1990. 1g-2g.

The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution:

Article III, §2, clause 1 of the Constitution, provides that,

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of Admiralty and Maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens

of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or Citizens thereof, and foreign States, Citizens or Subjects.”

Statute:

§505 of the Federal Water Pollution Control Act, 33 U.S.C. §1365 (hereafter referred to as the “Clean Water Act” or the “FWPCA”) provides in pertinent part:

“Citizen Suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this Title, any citizen may commence a civil action on his own behalf —

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.”

The entirety of §505 of the Clean Water Act is set forth in Appendix “H” (1h to 3h).

STATEMENT OF THE CASE

1. a. The Federal Water Pollution Control Act establishes a comprehensive regulatory program to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). In relevant part, the FWPCA establishes a permitting program for point source discharges into "navigable waters," and this program is designated as the "National Pollutant Discharge Elimination System" ("NPDES") program. 33 U.S.C. §1341 *et seq.* A permit to discharge is known as an "NPDES" permit, or in New Jersey as a New Jersey Pollutant Discharge Elimination System ("NJPDES") permit.

The FWPCA permits enforcement of the NPDES program by the United States Environmental Protection Agency, or where authority has been delegated to a state, by the state's environmental agency. 33 U.S.C. §1342(b). In New Jersey this authority was delegated in 1982 by the EPA to the New Jersey Department of Environmental Protection ("DEP").

The FWPCA also permits enforcement of the NPDES program, in certain circumstances, through "citizen suits." 33 U.S.C. §1365 (also known as §505 of the Act). In the present case and on January 27, 1984, two environmental organizations, Public Interest Research Group of New Jersey, Inc. ("PIRG") and Friends of the Earth ("FOE"), initiated a citizen suit under §505 of the Act alleging that defendant had violated its NJPDES permit and seeking statutory penalties and injunctive relief. li to 7i. This is the basis on which jurisdiction was invoked in the district court.

b. The defendant, Powell Duffryn Terminals, Inc., a New Jersey corporation ("PDT"), is an NJPDES permit-holder operating a bulk storage facility (tank farm) in Bayonne, New Jersey. PDT is located on land adjacent to the Kill Van Kull, which is one of the most industrialized waterways in the United States. 47a. Powell Duffryn neither manufactures nor refines products, and serves as a storage facility of others' liquid products. By 1987 a state-of-the-art wastewater treatment facility, known as the "Zimpro" system, was completed by Powell Duffryn

to treat all of its effluent, consisting primarily of rainwater, before discharge of the effluent into the Kill Van Kull. A-1854 to 1855.

c. From the outset and throughout all proceedings, Powell Duffryn has challenged plaintiffs' allegations of standing under Article III of the Constitution. PDT has produced affidavits, which are unrebutted, that it is not the cause of, nor does it contribute to, the environmental injuries complained of by plaintiffs. 1k to 2m. LeRoy Sullivan, an expert in civil and environmental engineering (A-1669), attested that "[t]he conditions complained of by the plaintiffs ... are caused by sources other than Powell Duffryn ... They do not derive from the constituents of P.D.'s discharge. P.D. is not the source." 1k-4k. The affidavits state further that none of the conditions complained of by plaintiffs, such as water discoloration, sheen and/or smell, exist or are present in the Kill Van Kull at or around PDT. 1(l)-2(l), 2m. The affidavits certify that the sources of the pollution complained of by plaintiffs are "downstream" from PDT, and that there is no causal relationship between Powell Duffryn's discharge and plaintiffs' alleged injuries. 1(l)-2(l) (par. #22), 1k-4k. The evidence identifies two sewage treatment plants which discharge up to sixty million (60,000,000) gallons of treated sewage per day into the Kill Van Kull, and which are located within 200-300 yards of a park where plaintiffs state that they walk and birdwatch, as sources of plaintiffs' alleged injuries. A-1621 to 1622 and 1(l)-2(l) (par. #22), 3k.³

³ Testimony at trial on the issue of civil penalties also shows that Powell Duffryn's discharge is not a cause of plaintiffs' alleged injuries. Powell Duffryn produced the expert testimony of Dr. Richard Hires, Ph.D, an expert in physical oceanography (A-2012). Dr. Hires testified that he conducted a rhodamine dye tracer study to assess the impacts, if any, of PDT's discharge. This is a comprehensive study using a specialized dye to track the distribution of an effluent in receiving waters. A-1954 to 1956. It is the state-of-the-art means utilized in the study of the effects, if any, of a discharge on water quality and marine communities. He testified that, to a reasonable scientific certainty, PDT did not cause or contribute to the conditions complained of by plaintiffs. A-2018 to 2020. This evidence was unrebutted by plaintiffs. The district court asked plaintiffs, "Are you going to present testimony that it [Powell Duffryn's discharge] has an impact?" (A-1969). Plaintiffs answered, "[I] don't think we're going to." A-1969. They did not.

d. Plaintiffs produced no affidavits, testimony or other evidence to demonstrate that the environmental conditions which they claimed aggrieved them were in fact a result of, and fairly traceable to, PDT's alleged conduct. Nor was evidence presented to rebut Powell Duffryn's proof that there was no causation between its discharge and plaintiffs' alleged injuries.

e. On December 19, 1984, PDT moved under *Fed. R. Civ. P.* 56 for summary judgment dismissing the complaint because plaintiffs failed to satisfy the second and third requirements for Article III standing — causation and redressability. A-81 to A-88. Presented with plaintiffs' lack of proof of causation and Powell Duffryn's affidavits, the district court stated —

"... it is *not the court's role* to determine whether defendant is polluting the Kill Van Kull and rather the court's role [in adjudging standing] [is] to determine whether the FWPCA ... has been violated." *PIRG, et al. v. Powell Duffryn Terminals, Inc.*, 627 F.Supp. 1074, 1083 (D.N.J. 1986) emphasis added. (19f).

The district court then held,

"Plaintiffs *show causation merely by showing violations of the discharge permit* ... plaintiffs meet the second part of the *Valley Forge* test if they show these violations." 627 F.Supp. at 1083, emphasis added. (19f).

2. a. The question of standing thereby decided by the district court arose out of plaintiffs' general allegations of causation in their complaint. At paragraphs #7 and 9 they alleged broadly that their members "reside in the vicinity of," or own property or recreate "in, on or near portions of the Kill Van Kull and Upper and Lower New York Bay that are affected by defendant's discharge" and that defendant's discharge "directly affects the health, economic, recreational, aesthetic and environmental interests and well-being" of PIRG's and FOE's members. 3i-4i. The complaint further alleged that the interests of PIRG's and FOE's "members have been are being and will be adversely

affected by the defendant's violation of the terms and conditions" of defendant's NJPDES permit. See Complaint par(s) #7 and 9 (3i-4i).⁴

b. PDT immediately challenged these general allegations, on which standing was predicated, as unsupportable and untrue. A-59 and A-81 to A-87. Because of this question by PDT, the district court bifurcated the case, with discovery to proceed on standing. After its completion, cross-motions for summary judgment were to be filed by plaintiffs on liability and by PDT, if warranted, for dismissal for lack of standing. A-63 to A-68. If plaintiffs were granted summary judgment on liability, which eventually they were (1f to 32f), the case would proceed on the issues of civil penalties and injunctive relief. A-63 to A-66.

c. At the outset of this discovery on the question of standing, PDT propounded interrogatories on plaintiffs asking PIRG and FOE to identify the members referred to in the complaint, on whom standing was based, and who, prior to commencement of suit, actually "were consulted by you [plaintiffs] regarding adverse impacts if any on their interests resulting from defendant's discharges" 2j-3j. Both PIRG and FOE replied in answers to these interrogatories that they could not identify such members(s) —

"No members of NJPIRG [and/or of FOE] were consulted regarding adverse impacts of defendant's discharges prior to the institution of this suit." 2j to 3j, (interrogatories #17 and 18).

When suit was started the identity of the members generally referred to in the complaint, as residing, owning property or recreating on portions of the Kill Van Kull or New York Bay "affected by defendant's discharge," was not known to plaintiffs.

After the interrogatories were propounded, plaintiffs canvassed their memberships and selected five individuals on whom

⁴See *Sierra Club v. Morton*, 405 U.S. 727 (1973).

they would seek to rely for standing. They then obtained affidavits from each of the five to be relied on for standing. Judge Aldisert, in his concurring opinion in the court of appeals, described this process by plaintiffs —

“I see PIRG and FOE in the position of the old-time vaudeville performer’s ad in *Variety*: ‘Have tux, will travel.’ PIRG and FOE advertised: ‘Have case, need live-bodied members/plaintiffs.’ ” 43a.

He added, “[m]aybe the wrong plaintiffs were recruited ... Whatever the case, constitutional standing is a serious question here.” 44a.

d. During discovery on the issue of causation, Powell Duffryn also questioned whether plaintiffs possessed any factual basis to support their allegations that their members’ alleged environmental injury was a result of PDT’s discharge. In interrogatories directed to the veracity of the allegations in paragraphs #6-9 of the complaint, PDT asked PIRG and FOE,

“Do you [plaintiffs] have any factual information and/or expert reports on the issue of whether defendant’s discharge of pollutants has affected the water quality and/or the ecosystem of the Kill Van Kull, Upper New York Bay and/or Lower New York Bay?” 1j-2j.

Plaintiffs answered that they did not in fact possess factual information or expert reports on the effects of defendant’s discharge on these waters —

“At the present time, plaintiffs do not have any factual information and/or expert reports regarding the effects of defendant’s discharge of pollutants on the water quality and/or the ecosystem of the Kill Van Kull, Lower New York Bay and/or Upper New York Bay?” 2j.

During the ensuing five years of litigation, plaintiffs presented no evidence that there was a causal connection between the

injuries complained of by their members and defendant's discharge.⁵

e. In the affidavits which plaintiffs produced after locating the five members identified for standing, PIRG and FOE instead described generally that water in the Kill Van Kull was polluted and that, if it were cleaner, these members would recreate more in the area. (See 1(o)-8(o) and decision of the court of appeals at 10a to 11a.) No affiant attested to whether (or how), if at all, Powell Duffryn's discharge related to their present or future activities. No affiant expressed a claim against PDT. Facts demonstrating causation were not alleged or shown in the affidavits.

3. a. Each affiant was therefore deposed, during which both their statements in the affidavits and plaintiffs' related allegations in paragraphs 6-9 of the complaint were examined.⁶

Sheldon Abrams, one of the five members, testified that in fact he does not own property in the vicinity of the Kill Van Kull, Upper New York Bay or Lower New York Bay (A-263) and that:

"Q. [By Mr. Edelstein] You don't engage in any activities along the Kill Van Kull, do you?

A. [By Mr. Abrams] No." A-276. See also 50a.

⁵ In the pretrial order the parties stipulated that, "plaintiffs will not present testimony on the issue of plaintiffs' continued standing in this case at the trial on relief ... [I]f plaintiffs had standing to maintain this action at the time of this Court's order of January 13, 1986, then plaintiffs continue to have standing at the time of the trial on relief in this matter and that, if plaintiffs lacked standing at the outset of this case or at the time of the Court's order of January 13, 1986, then plaintiffs also lack standing at the time of the trial on relief in this matter." A-615.

⁶ The entire deposition transcripts are included in the joint appendix in the court of appeals, at pages A-222 to A-462.

He testified that he lives in Monmouth County about 40-50 miles from the Kill Van Kull (A-263), and that his actual activities are occasional boating near South Beach ten (10) or more miles from the Kill Van Kull and PDT. A-274 to 276. He acknowledged that his alleged interest was "very generalized" (A-272) and that,

"Q. [By Mr. Edelstein] You can answer this specifically. Do you have any facts on which to base a personal claim that you as an individual ... have been, are being, and will be adversely affected by this defendant's discharge?"

A. [By Mr. Abrams] *I have no personal claim.*" (A-286 to A-287) (emphasis added). See also, 51a.

The deposition testimony of Mr. Abrams and each of the other affiants disclosed further that plaintiffs never asked the affiants if the allegations in paragraphs #7 and 9 of the complaint, that defendant's discharge adversely affected their interests, were true. A-280, A-453, A-239, A-318 and A-339. Nor did any affiant ever attest that plaintiffs' allegations in this regard were true.⁷

b. *Melissa Ven Ditti* — Ms. Ven Ditti testified in her deposition that she has never used the Kill Van Kull for recreational purposes (A-395 and 52a). Her allegation is that she occasionally walks at the Kill Van Kull park, which is 1.8 miles to the west of PDT. A-395. There is no access from the park to the Kill, A-623. Under examination by PDT, she acknowledged that the only environmental concern affecting her use of the park is a *smell*. A-433, A-397, A-399 and A-410. Powell Duffryn does not cause the smell. A-2018 to A-2020. (See also concurring opinion in the court of appeals at page 52a.)

⁷ The concurring opinion in the court of appeals found that, "... the testimony at the deposition indicates less facts supporting standing than was found by the district court." 50a.

When Ms. Van Ditti was asked by defendant, "[A]re you claiming that you have an interest which is being or will be adversely affected by this defendant's discharge," the answer was "No." A-426.

c. *Cheryl Cummings* — Ms. Cummings testified at her deposition that she has never used the Kill Van Kull for any recreational activity (A-243), and that none of the area where she walks at the park has access to the Kill. See 48a-50a and A-243. She acknowledged that:

"Q. [By Mr. Edelstein] To you personally then the outcome of this lawsuit won't affect your use of the park, right?

A. [By Ms. Cummings] Correct." A-243 and 49a.

She further testified that plaintiffs had not read the allegations of the complaint to her, and instead that she was contacted by plaintiffs' counsel after suit was started, and then asked only to "answer a few questions [about] how often I go down there [to the park], what I do down there, how I enjoy my activities." A-232 to 235. Plaintiffs in turn prepared Ms. Cummings' affidavit on which standing is based, although Ms. Cummings also testified that if paragraph #7 of the Complaint had been read to her, she would *not* have authorized plaintiffs to use her "as a person on whom they could rely for standing." A-257

The testimony by Ms. Cummings continues:

"Q. [By Mr. Edelstein] If ... it was important that the allegations of Paragraph #7 have to be correct as to you, would you object to participating in this lawsuit?

A. [By Ms. Cummings] Yes." A-259.

Ms. Cummings in further testimony stated,

“Q. [By Mr. Edelstein] Did Barbara [plaintiffs’ paralegal] explain to you that the allegations in this suit were that there was a direct adverse effect on your aesthetic, environmental, economic, recreational activities due to Powell Duffryn’s discharge?

A. [By Ms. Cummings] No.

Q. If [the allegations in the suit] had been explained to you, would you have been able to join in this suit?

A. No.

Q. Would you have been able to sign the affidavit?

A. No.” A-248 to A-249, 50a.

d. *Andrew Gerbino* — Mr. Gerbino’s recreational activities are south of South Beach, New York (A-314), at a location which is approximately thirteen miles from Powell Duffryn and the Kill Van Kull. 51a. As Judge Aldisert noted, Mr. Gerbino’s recreational activities are “thus unaffected by [PDT’s] discharge.” 51a. He does not own property on the Kill Van Kull, nor in the vicinity of Powell Duffryn. 5(o).

Mr. Gerbino testified further that, as a member of FOE, he had received a “general questionnaire” asking broadly “how I felt about various aspects of the pollution in Staten Island” (A-292-293). After suit was started, he was contacted by FOE’s attorneys and asked to sign “a general affidavit just backing up my answers to questions on the questionnaire.” A-296. He testified that he did so to “verify [his] answers on [the] questionnaire.” He then became one of plaintiffs’ five members relied on for standing. A-299.

Judge Aldisert noted that Mr. Gerbino, in his deposition, in fact “agreed that his generalized assertion in this case is actually that only, ‘any discharge from anywhere that finds its way to

Lower New York Bay adversely affects him' " 51a-52a. When asked whether it was his position that a discharge "20 miles away or 50 miles away or a hundred miles away" would adversely affect his interests, if tides "took it to Lower New York Bay," he answered, "Yes" A-322 to A-323. He agreed that "based on that generalization" he is "participating in this lawsuit." A-323. No claim was asserted against PDT. In fact, Mr. Gerbino was neither read the complaint, nor asked if the allegations in it against PDT were true. A-318.

e. *Douglas MacNeil* — Mr. MacNeil testified that he owns no property, nor does he reside, at or near the Kill Van Kull or Powell Duffryn. A-331 to A-333, A-353. He does not recreate on the Kill Van Kull. A-334 to A-335. He said that he birdwatches at the park 1.8 miles west of PDT, and expressed the opinion that if the water were cleaner his birdwatching might be improved. A-357. (PDT's activities are unrelated to the water conditions at or near the park. See A-2018 to 2020.) He testified further that he possessed no facts indicating that defendant's discharge adversely affected him, and that regarding his affidavit and knowledge of the case, "no one said that [PDT's] discharge directly [injures him] and *I don't assert it.*" A-347 to 348, emphasis added. See Judge Aldisert's concurring opinion at pages 52a to 53a.

f. None of the deponents testified that they reside in the vicinity of, or own property or recreate in, on or near portions, if any, of the Kill Van Kull and New York Bay "affected by defendant's discharge." 3i. Judge Aldisert observed "no individual plaintiff was able to say that ... the specific condition that was the object of his or her complaint was caused by Powell Duffryn." 53a.

4. a. After these depositions were completed, the parties moved for summary judgment under *Fed. R. Civ. P.* 56. Plaintiffs sought judgment on defendant's liability, and PDT requested dismissal for plaintiffs' lack of Article III standing. A-82. In support of its motion to dismiss for lack of standing, PDT submitted expert affidavits, as described above in paragraph 1(c), which

were un rebutted both at this motion and throughout all proceedings below. The evidence showed that Powell Duffryn's operations and discharge did not cause and did not contribute to the conditions in the Kill Van Kull, Upper New York Bay or Lower New York Bay that plaintiffs' members said aggrieved them. (1k to 2m). These affidavits were in addition to PIRG and FOE's certified answers to interrogatories that plaintiffs possessed no factual information "regarding the effects of defendant's discharge" on the Kill Van Kull and/or New York Bay.

b. After stating its conclusion that "causation [is shown] merely by showing violations of the discharge permit" (19f), the district court upheld plaintiffs' standing. On the third prong of the *Valley Forge* test for Article III standing, that plaintiff's injury can be "redressed by a favorable decision" (454 U.S. at 472-474), the district court also held that,

"Plaintiffs have standing to redress their injuries by seeking relief in the form of general deterrence." 627 F.Supp. at 1083. (20f).

5. In addition to upholding standing, the district court summarily found PDT to be liable in total for 386 violations of its NPDES permit. (7a).

Powell Duffryn denied the allegations of liability, submitting that: (1) plaintiffs had mis-interpreted and misapplied data on laboratory reports and on the discharge monitoring reports ("DMRs") to erroneously allege that violations had occurred; and that (2) plaintiffs had overcounted or "duplicate" counted alleged violations. Powell Duffryn proffered affidavits to show, for example, that violations did not occur in 124 instances alleged by plaintiffs for the parameters known as biochemical oxygen demand ("BOD") and total suspended solids ("TSS") because the permit provisions and laboratory data cited by plaintiffs did not apply to PDT. A-96 to A-99, A-136 to A-139.⁸

⁸ At trial on the issue of penalties, for example, PDT produced the testimony of Marian Casper, formerly supervisor at the EPA and in charge of reviewing
(Footnote continued)

6. a. In May, 1989 the case was tried on the issues of civil penalties and injunctive relief. On September 19, 1989 the district court rendered its judgment penalizing defendant the total of \$3,205,000.00 and issuing a permanent injunction. Of the \$3,205,000.00 penalty, \$1,330,000.00 was assessed for the violations attributable to BOD and TSS.

7. PDT appealed, challenging the summary determination of liability and the district court's jurisdiction on the basis that plaintiffs lacked standing. The court of appeals affirmed on these issues. 1a-54a.

In its decision on standing, the court of appeals did not rely on or refer to proof in the record that the conditions complained of by plaintiffs, at locations miles distant from PDT, were in fact a result of PDT's discharge, or caused by Powell Duffryn. Plaintiffs produced no such evidence. The court noted instead that "several affiants stated that the water has an oily or greasy sheen they found offensive" and that defendant had reported discharges in excess of its permit limit for a parameter known as "oil and grease". 15a. On this basis the court presumed that the injury alleged by the plaintiffs, miles from PDT, "may be fairly traced to PDT's effluent." 15a.

The court of appeals adopted distinct criteria on which an environmental organization may establish causation for the purposes of Article III standing in all "Clean Water Act cases," as differentiated from other types or classes of cases within the judicial power of the court. The decision holds —

"In a Clean Water Act case, this likelihood [that defendant's conduct caused plaintiffs' harm] may be established by showing that a defendant has (1) discharged some pollutant in concentrations greater

Powell Duffryn's DMR(s) for compliance. She testified, corroborating Messrs. Sprague and Sullivan's affidavits, that,

"Q. [By Mr. Edelstein] "... Did the Agency [EPA] have a policy whether these [BOD and TSS] requirements were applicable to these intermittent dischargers [i.e., PDT]?"

A. [By Ms. Casper] Yes ... They did not apply." A-1921 at lines 2-7.

than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) this pollution causes or contributes to the *kinds* of injuries alleged by the plaintiffs." 14a, emphasis added.

The court of appeals adopted, as did the district court, a test for Article III standing where evidence of causation is not required.

8. Judge Aldisert concurred, expressing "a nagging doubt about standing." 41a. He reviewed the evidence adduced at plaintiffs' members' depositions, and then wrote,

"Throughout my extensive preparation of this case including close attention at argument and discussion with my colleagues at conference, I was persuaded that the member plaintiffs had *failed* to show an actual injury that was traceable to the permit violations. (41a, emphasis added).

* * *

What troubles me from the testimony is any indication that the injury-in-fact was fairly traceable." 53a.

In his concurrence Judge Aldisert stated further, "The standing case put in by [PIRG and FOE] is so skinny that I am concerned seriously our discussion will not survive careful Supreme Court review." 41a. He explained in this regard that Congressional enthusiasm "for cleansing our nation's waterways" had led "environmental organizations and citizen/plaintiffs to mistakenly believe that they have standing to sue any time a discharge permit is violated." 41a-42a. Thus as here they present "a gossamer case of standing." 48a. Summarizing the record *sub judice* Judge Aldisert queried,

"Is it [plaintiff's case on standing] enough? I'm not sure. Were this not an environmental case, it would not be." 53a.

Concurring in this holding that differentiates "Clean Water Act cases," for Article III standing, from other classes of cases, Judge Aldisert expressed an underlying "notion" that in an environmental case there are "evolving precepts of standing [which] are perhaps expanded a bit when at stake are the great public policy considerations of insults to our environment." 53a-54a. He expressed the belief that "somehow the Supreme Court might be inclined to relax its stringent requirements of standing in environmental cases." 42a. Judge Aldisert wrote further —

"I join in this opinion ... with the shakiest of jurisprudential confidence. My intrepidity, questionable as it is, is the product of abject rationalization: If the Supreme Court does not agree to review and reverse, then perhaps if we are not absolutely correct, at least we are not totally wrong." 41a.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals has identified an entire class of cases, those arising under the "Clean Water Act," and has relaxed Article III's requirements for standing in these §505 cases. 14a. Proof of causation — that the environmental injury complained is in fact fairly traceable to and "as a consequence of" defendant's conduct — is not required. See *contra*, *Valley Forge*, 454 U.S. at 485.

The court of appeals also has applied new criteria for "redressability" under Article III in Clean Water Act cases. If the general "public interest in clean waterways will be served" by issuance of a penalty or injunction (16a), then plaintiffs need not prove that the "actual injury" identified by the individual members, on whom they rely for standing, will be redressed by "a favorable decision." *Valley Forge*, 454 U.S. at 472.

This decision therefore re-crafts both the second and third requirements for Article III standing — causation and redressability. In doing so, the decision of the court of appeals is fundamentally inconsistent with this Court's application of Article III and the Constitution's limitation on the federal judicial power. *Valley Forge*, 454 U.S. at 489-490. The court of appeals

has "ignore[d] [the] unambiguous limitations [imposed by Article III] on ... citizen standing." *Valley Forge*, 454 U.S. at 488. As Judge Aldisert observed, "constitutional standing is a serious question here." 44a.

The decision of the court of appeals thus has far-ranging consequences. It opens an entire class of cases, all those brought under §505 of the Clean Water Act, to lesser criteria for citizen standing than this Court has permitted. See, e.g., *Lujan v. National Wildlife Federation, et al.*, 497 U.S. ___, 110 S.Ct. 3177, 3185-3189, 111 L.Ed.2d. 695, 712-717 (1990). Already these plaintiffs have filed at least thirty §505 cases in the district of New Jersey (8n to 11n), where the district court is regularly expressing its willingness, despite the strictures of Article III, to easily relax Article III's jurisdictional limitations, as here. In *SPIRG Hercules Inc.*, 23 E.R.C. 2081, 2085 (D.N.J. 1986) the district court held, for example —

"... the [citizen] plaintiff [in a §505 case] need *not* make a specific, personalized showing of redressability. The benefit derived by the general public from the specific and general deterrence of future violations by defendant and other polluters through the imposition of civil penalties suffices ... Consistent with this conclusion is the *refusal* by the District of New Jersey in the past *to require plaintiff to prove that a specific injury was caused* by defendant in order to obtain standing." Emphasis added.

The court concluded,

"... the affiants' [i.e., plaintiffs'] inability to link the pollution of the river to defendants' activities is *irrelevant*." *Id.* at 2085, emphasis added.

See also, *SPIRG v. AT&T Bell Laboratories*, 617 F.Supp. 1190, 1200 (D.N.J. 1985) holding that, "[Clean Water Act] plaintiffs have standing to sue because the general public interest will benefit." A "personalized showing of redressability [is] *neither appropriate nor necessary*" for a §505 plaintiff. *Id.*

These cases pronounce a fundamentally flawed perspective on the Constitutional requirements of causation and redressability. Both are intrinsic to Article III standing. The announcement by the court that proof of causation is "irrelevant," and that a personalized showing of redressability is "[in]appropriate and [un]necessary" in an environmental case under the Clean Water Act expands judicial power beyond Constitutional limits. See, *United States v. Richardson*, 418 U.S. 166 (1974).

These errors are now endorsed by the court of appeals in *Powell Duffryn*. In these cases, climaxing in the *Powell Duffryn* decision, a consistent pattern has emerged, where Article III is impermissibly truncated in Clean Water Act cases. The court of appeals has stamped its approval on this erroneous expansion of federal judicial power.⁹

In doing so the court has carved out its own "special exception," for environmental cases (42a, 53a), from Article III's "rigorous requirements." *Valley Forge*, 454 U.S. at 475, 488. This result is emphatically improper: "This philosophy [by the court of appeals, to relax standing in view of the issue involved] has no place in our constitutional scheme ... [W]e are unwilling to countenance such a departure from the limits on judicial power contained in Article III" *Valley Forge* at 489-490. The court of appeals' decision thus so far departs from and misapplies bedrock principles of Article III standing, and in doing so exposes an entire class of cases to improper Constitutional analysis, that this Court's review is warranted.¹⁰

⁹ Nationwide, well over one hundred §505 suits have been started (1n to 17n), with hundreds of additional letters of intent to sue also served. The EPA has advised that during approximately the last six months, from April 23, 1990 through October 23, 1990, one hundred eight (108) new Notices of Intent to Sue under § 505 have been filed. See also, e.g., Schwartz & Hackett, "Citizen Suits Against Private Industry Under The Clean Water Act," 17 *National Resources Lawyer* 327 (1984). In their fee application to the Third Circuit, plaintiffs' counsel represented that they alone have initiated sixty (60) §505 cases.

¹⁰ *Valley Forge*, 454 U.S. at 489.

Indeed Judge Aldisert noted that in *Lujan* this Court conveyed its "strong signal" that "standing requirements in cases affecting the environment" are not, "repeat not," to be "totally relaxed." 42a. He cited specifically to the Court's "insist[ence]" that courts of appeal "not ... assume that general averments embrace the 'specific facts' needed to sustain standing." 43a.

"Wish[ing] [nonetheless] to find standing" in *Powell Duffryn*, because it is an "environmental case," he was willing, as was the court, to expand the "precepts of standing" in Clean Water Act cases to assume threshold facts of causation which were unproven, and rigorously challenged. 43a, 53a. As a result, general averments of causation, without supporting specific facts, now may be presumed as proven in §505 cases. This is an impermissible result. There is no "principled basis" for it and, instead, it advances the fallacious theory for standing, advocated by plaintiffs, that they need not prove causation in Clean Water Act cases. See *Contra, Valley Forge*, 454 U.S. at 472.

There is inherent danger in this proposition. It presumes that "the judicial power requires nothing more for its invocation" than issues of importance to plaintiffs and, in turn, urges the courts to "overstep [their] assigned role in our system of adjudicating only actual cases or controversies." See, *Valley Forge*, 454 U.S. at 489 and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 (1976). Essentially it permits suit indiscriminately against any defendant located anywhere along a watercourse without evidence "of ['real and immediate'] injury," and instead based on allegations by plaintiffs of " 'conjectural' or 'hypothetical' " causation. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). In Mr. Gerbino's deposition this unacceptable result, falling far short of Article III's mandate, was detailed —

"Q. [By Mr. Edelstein] Is there any distance away from the Lower New York Bay that you would consider a discharge not being involved? In other words, if there was a discharge 20 miles away or 50 miles away or a hundred miles away, would it be your position that that discharge, if tides took it to Lower New York Bay, would also similarly adversely affect your interests?

A. [By Mr. Gerbino] Yes, extends up to the Atlantic Highland for that matter.

Q. [It] Doesn't matter what the discharge is or where it comes from?...

A. Yes ...

Q. So, your position is that any discharge from anywhere that finds its way to Lower New York Bay adversely affects your interest; is that right? ...

A. Yes.

Q. Based on that generalization, you're participating in this lawsuit?

A. Right." A-322 to 323.

Under the decision of the court of appeals standing is "expanded" to permit suit by a citizen, such as Mr. Gerbino, if he generally alleges use of a waterway, miles distant from defendant (and where defendant's discharge has no impact), if defendant has filed a discharge monitoring report where an exceedance of certain parameters in an NPDES permit is noted. The court does not recognize any point of attenuation between plaintiffs' alleged injury and defendant's conduct — whether it be "20 miles away [from plaintiffs] or 50 miles away or a hundred miles away," and no proof of causation between defendant's discharge and the citizen's complaint is required. This is not what Article III permits. It is however the rule of law adopted by the court of appeals. 14a.

The decision thus is a serious abuse of federal jurisdiction, and demonstrative of an inherently flawed application of Article III. Standing is "perhaps the most important of [the jurisdictional] doctrines" which define and Constitutionally limit the power, and role, of the federal courts. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. ___, 110 S.Ct. 596, 607, 107 L.Ed.2d. 603, 621 (1990) citing *Allen v. Wright*, 468 U.S. 737, 750 (1984). It cannot

be “inferred argumentatively from averments in the pleadings,” and instead must be affirmatively demonstrated in the record. *FW/PBS, Inc.*, 110 S.Ct. at 608, 107 L.Ed.2d. at 622. Plaintiffs’ allegations relied on for standing “must be true and capable of proof at trial.” *U.S. v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 689 (1973). As a threshold matter it is plaintiff’s burden to prove facts demonstrating that it is a proper party to invoke the judicial power of the United States. *Warth v. Seldin*, 422 U.S. 490 (1975). This requirement cannot be waived and is one which the court has a “special obligation” to enforce.¹¹ Citizen suits under the FWPCA are expressly subject to these standing requirements. *Middlesex County Sewage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981).

Standing is “ground[ed] in the idea of separation of powers,” and the fundamental limit on the role of the federal courts in our system of governance. *Allen v. Wright*, 468 U.S. at 760. This is a seminal principle from which the court of appeals has deviated to satisfy, in Judge Aldisert’s words, a “strong desire to affirm the district court judgment” because this is an “environmental case.” To do so the court has given birth to the precedent that “Clean Water Act” plaintiffs need not prove causation or redressability. Standing was found,

“[O]n the most questionable of grounds — a belief that somehow the Supreme Court might be inclined to relax its stringent requirements of standing in environmental cases.” 42a.¹²

¹¹ *FW/PBS, Inc.*, 110 S.Ct. at 607, 107 L.Ed.2d at 621.

¹² The issue raised in this petition transcends Clean Water Act citizen suits. Like Section 505 of the Clean Water Act, numerous other environmental statutes also authorize private enforcement. This includes Section 310 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659; Section 326 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046; Section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972; Section 20 of the Toxic Substances Control Act, 15 U.S.C. § 2619(a)(1); and Section 304 of the Clean Air Act, 42 U.S.C. § 7604 (as amended by Section 707 of the Clean Air Act Amendments of 1990, P.L. 101-549).

(Footnote continued)

The "notion" of the court of appeals, that Article III permits standing without proof of causation or redressability, should be disabused. Organizational plaintiffs only have standing if an individual member: (1) has an actual, direct and personal stake in the outcome (i.e., "injury in fact"), *Sierra Club v. Morton*, 405 U.S. 727, 734-741, which (2) results from the "putatively illegal action [of defendant]" (*Warth v. Seldin*, 422 U.S. 499), and (3) which is "likely to be redressed by a favorable decision." *Valley Forge*, 454 U.S. 472.

A "generalized grievance" does not confer standing, whether it be over environmental protection, as here, or over a town's housing policies as enacted through its zoning ordinances, as in *Warth v. Seldin*, 422 U.S. 499. Rather, Article III is firm in its causation and redressability requirements, and proof of causation is a prerequisite to standing. Cf. *Duke Power Co. v. Carolina Environmental Study Group, Inc., et al.*, 438 U.S. 59 (1978).

In the absence of such proof of causation or redressability by plaintiffs, the defendant is entitled to judgment under *Fed. R. Civ. P. 56*:

"... Rule 56(e) provides that judgment 'shall be entered' against the non-moving party unless affidavits or other evidence 'set forth specific facts showing that there is a genuine issue for trial.' The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit" *Lujan*, 110 S.Ct. at 3188, 111 L.Ed.2d at 716.

In view of the substantial and expanding number of statutes dealing with the environment, relaxing Constitutional standing requirements for Clean Water Act citizen suits in turn promotes a multitude of similar suits under other environmental statutes. The lower courts' decisions in this case sanction a broad range of similar actions brought under a variety of statutes, allowing plaintiffs to file suit based solely on generalized notions of harm, without evidence of causation or redressability. For this additional reason, the Court should grant this petition and affirm the applicability of the causation in fact and redressability requirements to citizen plaintiffs in environmental cases.

Further, the Court has explained the prohibition against presuming "missing facts" in order to uphold standing, which is what the court of appeals nonetheless has now authorized on the crucial issue of causation in all Clean Water Act cases,

"Rule 56(e) is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action. It will not do to 'presume' the missing facts because without them the affidavit would not establish the injury that they generally allege." *Lujan*, 110 S.Ct. at 3189, 111 L.Ed.2d. at 716.

Powell Duffryn moved for dismissal under Rule 56, and submitted un rebutted affidavits that it neither caused nor contributed to the injuries complained of by plaintiffs. PDT directly certified that the constituents of its discharge do not cause the conditions complained of by plaintiffs. 3k (par. #26). This includes its reported exceedance of a general parameter called "oil and grease."

There is no evidence linking PDT's discharge of this parameter to plaintiffs' alleged injuries, and the proof, to the contrary, is that PDT is not the cause of plaintiffs' claimed injuries. The court of appeals however presumed missing facts — that when a defendant reports a discharge of such a generalized parameter, causation is *per se* established. This not only wrongly applied Rule 56, but also propounded an unacceptable rule for Article III standing: in "Clean Water Act cases" the court will assume specific facts from general averments of causation and, from these assumptions, find causation in fact and uphold plaintiffs' standing. The holding thus entrenches the flawed belief, *recurring in §505 cases*, that actual proof of causation by plaintiffs is "irrelevant" and that a personalized showing of redressability is "neither appropriate nor necessary." *SPIRG v. Hercules, supra*, and *SPIRG v. AT&T, supra*. This decision by the court of appeals should not be permitted to stand and thereby to control the application of Article III in Clean Water Act cases.

When essential questions of standing are in issue, certiorari is warranted. *Valley Forge*, 454 U.S. 470 ("Because of the unusually broad and novel view of standing to litigate a substantive question in the federal courts adopted by the court of appeals, we grant certiorari") and *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) ("We granted certiorari ... because of the important questions of standing raised under Title VIII of the Civil Rights Act of 1968.") Here, important questions of standing in each citizen suit under the Clean Water Act are directly in issue. May citizen-plaintiffs litigate substantive questions in the federal courts, under the FWPCA or similar environmental statutes, in the absence of evidence of causation or redressability, and based on the court's presumption of these missing facts from general controverted averments? Article III has been directly mis-applied in the decision of the court of appeals, which now stands as precedent that proof of causation and evidence of redressability are not required in § 505 cases. PDT submits respectfully that the petition for a writ of certiorari therefore should be granted.

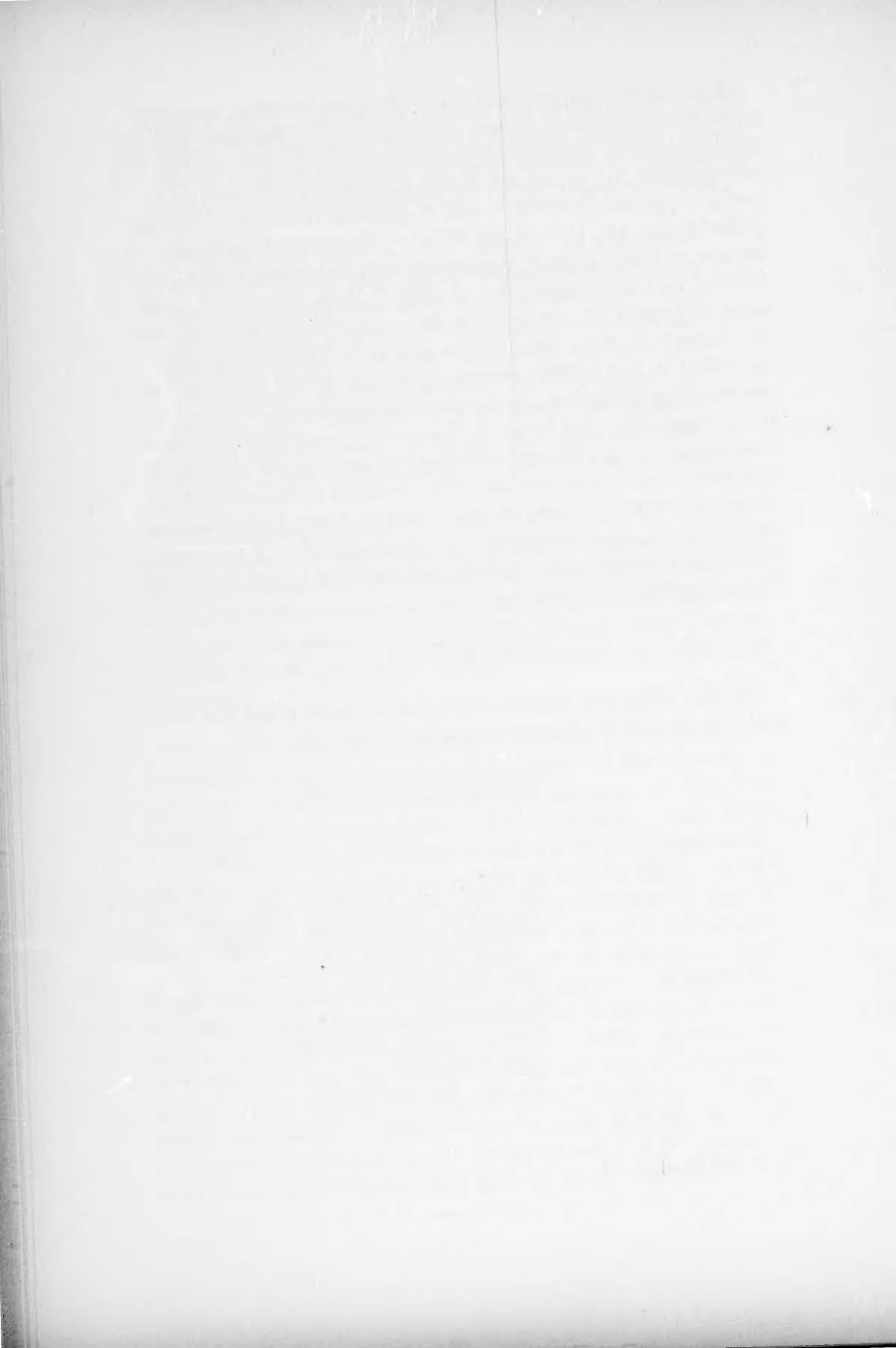
CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court of appeals.

Respectfully submitted,

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APPENDIX A



Filed: August 20, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5831

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC. and
FRIENDS OF THE EARTH

V.

POWELL DUFFRYN TERMINALS INC.,
Appellant

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Intervenor

No. 89-5851

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC. and
FRIENDS OF THE EARTH,
Appellants

V.

POWELL DUFFRYN TERMINALS INC.

No. 89-5861

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC. and
FRIENDS OF THE EARTH

V.

POWELL DUFFRYN TERMINALS INC.
WILLIAM B. REILLY,
in his capacity as Administrator,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Appellant

Appeal from the United States
District Court for the
District of New Jersey
(D.C. Civil No. 84-00340)

Argued May 21, 1990

Before: SCIRICA, NYGAARD
and ALDISERT, *Circuit Judges*
(Opinion filed August 20, 1990)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge*

In this Clean Water Act citizen suit, the district court granted summary judgment to plaintiffs Public Interest Research Interest Group of New Jersey and Friends of the Earth (collectively "PIRG"), finding that defendant Powell Duffryn Terminals, Inc. ("PDT") had violated its National Pollution Discharge Elimination System ("NPDES") permit 386 times over a period of six years. After a bench trial on the issue of penalties, the district court permanently enjoined PDT from violating the terms of its NPDES permit and assessed \$3,205,000 in civil penalties. Both parties appeal. We will affirm in part and reverse in part.

I. Background Facts and Procedural History

The Federal Water Pollution Control Act ("the Act") was enacted by Congress in 1972. The purpose of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" with the goal "that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1).

The Act provides an effective mechanism for monitoring and limiting polluting discharges. Section 301(a) flatly prohibits anyone from discharging any pollutant except as permitted by the Act. 33 U.S.C. § 1311(a). A person wishing to discharge into the navigable waters must obtain a National Discharge Elimination System ("NPDES") permit. 33 U.S.C. § 1342. These permits contain detailed limits (or parameters) on the types and concentrations of pollutants a permit holder may discharge. A person

who complies with the permit parameters is deemed to comply with the Act. 33 U.S.C. § 1342(k). The Act further requires permittees to install and maintain equipment to test its effluent. 33 U.S.C. § 1318(a). The test results must then be reported to the Environmental Protection Agency ("EPA") on Discharge Monitoring Reports ("DMRs"). 40 C.F.R. §§ 122.41(j) & 122.48 (1989). A comparison of the permit limits with the reported concentrations quickly reveals whether a permittee is complying with its permit. Finally, the Act permits aggrieved citizens to sue permit violators. 33 U.S.C. § 1365.

PDT, a New Jersey corporation, is an NPDES permit holder operating a bulk storage facility in Bayonne, New Jersey. This tank farm is located on land adjacent to the Kill Van Kull, a navigable body of water. PDT uses the large tanks at the site to store various liquids owned by others. These liquids include petroleum products and industrial chemicals. When liquids are transferred, some spillage occurs. The spillage mixes with rainwater and the run-off pollutes the Kill Van Kull.

When PDT acquired the facility, it was subject to an injunction issued by the United States District Court for the District of New Jersey. *United States v. El Dorado Terminals Corp.*, CA No. 77-228 (D.N.J. April 14, 1977). The injunction required the site owner to build a wastewater treatment plant by July 1, 1977 to treat the polluted run-off. After purchasing the facility, PDT did some remedial work at the site, mainly paving and constructing some ditches and dikes to channel the rainwater. PDT did not, however, construct the required wastewater treatment plant until 1987.

Since 1974, PDT (or its predecessor in interest) has held a series of NPDES permits which allowed it to discharge effluent into the Kill Van Kull. PDT's DMRs

indicate that PDT (or its predecessor) has consistently and uninterruptedly dumped pollutants into the Kill Van Kull in concentrations greater than that allowed by its permit.

Plaintiffs are non-profit corporations concerned with environmental issues. On January 27, 1984, they filed a citizen suit against PDT pursuant to section 505 of the Act, 33 U.S.C. § 1365(a)¹, seeking a judgment of liability, civil penalties and injunctive relief, alleging that PDT was violating its NPDES permit. PIRG gave the required sixty-day notice of suit to the EPA and the New Jersey Department of Environmental Protection. 33 U.S.C. § 1365(b).

The district court bifurcated the case, with liability to be determined first and civil penalties and injunctive relief, if any, to be considered afterward. PIRG moved for summary judgment on the issue of PDT's liability. PDT opposed the motion, alleging that PIRG lacked standing and that material facts as to liability were in dispute.

The district court granted PIRG's motion for summary judgment in an order dated January 13, 1986, finding that PIRG had standing and that PDT had violated its NPDES permit 154 times from July, 1977 to June, 1984. *Student Public Interest Group of New Jersey, Inc. v. P.D. Oil & Chemical Storage*,

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1. This section states, in relevant part:

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person...who is alleged to be in violation of...an order issued by the Administrator or a State with respect to...(an effluent) standard or limitation....

Inc., 627 F. Supp. 1074 (D.N.J. 1986) ("PIRG I"). PIRG submitted another motion for summary judgment alleging that PDT continued to violate its permit during the litigation. On March 13, 1987, the district court granted summary judgment to PIRG on an additional 46 violations.

PIRG moved for a preliminary injunction on May 17, 1988 to enjoin further permit violations by PDT. The district court denied this motion in part because PIRG had failed to demonstrate that irreparable harm was imminent.

PIRG filed its third and final motion for summary judgment on liability on December 29, 1988, alleging an additional 190 violations. Four items were erroneously included and PIRG later removed them from the list. PDT again opposed summary judgment. On May 4, 1989, the first day of the bench trial on penalties, the district court granted PIRG's motion for summary judgment, bringing the total number of PDT's violations to 386.

Following a one week bench trial on the issue of penalties, the district court found that PDT had consistently violated its permit and should be assessed the maximum penalty. *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158 (D.N.J. 1989) ("PIRG II"). The court based the fine on the seriousness of the violations, the large economic benefit reaped by PDT by delaying compliance, the lack of good faith efforts by PDT to comply with its NPDES permits and the fact that the penalty would not threaten PDT's economic survival. After calculating the maximum penalty to be \$4,205,000,²

2. Before 1987, section 309(d) of the Act provided for a civil penalty "not to exceed \$10,000 per day of such violation." 33 U.S.C. § 1319(d) (1986). This section was amended effective

the district court reduced the penalty by \$1,000,000 because the EPA and the NJDEP had failed to diligently prosecute PDT. The district court ordered PDT to pay the \$3,205,000 into a trust fund to be used for improving the environment in New Jersey. Finally, the district court entered a permanent injunction prohibiting PDT from violating its permit. *PIRG II*, 720 F. Supp. at 1160.

PDT contends that the district court erred by failing to dismiss the case because the plaintiffs lack standing, by failing to apply a five year statute of limitations and by granting summary judgment on liability. PDT also contends that the district court's factual findings supporting the award of civil penalties are clearly erroneous and that the injunction is overbroad. PIRG contends that the nonfeasance of the EPA and the NJDEP is an illegitimate basis for reducing the penalty. Although the EPA was not a party below, we permitted the EPA to intervene to contest the creation of a private trust fund with the civil penalties.

II. Standing

The requirement that a party have standing flows from the Article III requirement of a "case or controversy."³ U.S. Const. art. III, § 2, cl. 1. Standing

February 4, 1987 to allow a civil penalty "not to exceed \$25,000 per day for each violation." 33 U.S.C. § 1319(d) (1987). The district court calculated the maximum penalty by multiplying the 363 violations occurring before February 4, 1987 by \$10,000 and the 23 violations occurring after that date by \$25,000.

3. In addition to constitutional considerations, there are prudential limitations that may lead a court to deny standing. In

analysis focuses on whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). PIRG seeks to represent the interests of its members. Such "representational standing" is appropriate where 1) the organization's members would have standing to sue on their own, 2) the interests the organization seeks to protect are germane to its purpose, and 3) neither the claim asserted nor the relief requested requires individual participation by its members. See *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Automobile Workers v. Brock*, 477 U.S. 274 (1986). PDT contends that PIRG's individual members would not have standing to pursue this suit on their own, so PIRG lacks standing to sue.

For individual standing, the Supreme Court states that:

this case, we need not consider such prudential limitations since the Act explicitly confers standing to the limits of the constitution. See *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."). Section 505(a) of the Act allows a citizen to bring a civil action against any person "who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation...." 33 U.S.C. § 1365(a)(1). Section 505(g) further defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). The legislative history of this section indicates that Congress intended by this language to incorporate the definition of standing set forth in *Sierra Club v. Morton*, 405 U.S. 727 (1972). See 1972 U.S. Code Cong. & Admin. News 3668, 3776, 3823; *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981).

at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,"...and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision...."

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982) (citations omitted). PDT argues that PIRG failed to establish injury in fact, failed to trace any injury to PDT's conduct and failed to show how this lawsuit could redress any of PIRG's injury. The district court found otherwise. See *PIRG I*, 627 F. Supp. at 1081-83. PDT originally challenged PIRG's standing in a motion to dismiss. Since additional evidence was submitted on this issue, the district court properly treated the motion as one for summary judgment. Fed. R. Civ. P. 12(b). The district court decided that PIRG had standing and refused to dismiss the action. In reviewing this decision, we view the evidence in the light most favorable to PIRG, the non-moving party. *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1093 (3d Cir. 1988). Our review of this essentially legal question is plenary.

A. Injury in Fact

PIRG asserted generally in its complaint that its members resided in the vicinity of or owned property on or near the Kill Van Kull, or recreated on or near the Kill Van Kull. Complaint ¶¶ 7, 9, Joint App. p. 44-45. PIRG supported these assertions by submitting affidavits from five members. All affiants state that they are members of one of the plaintiff organizations

and reside in the vicinity of the Kill Van Kull. The affiants state that they hike, jog or bicycle along the shores of the Kill Van Kull. Several affiants state that they recreate in the Kill Van Kull Park, a public park located approximately two miles downstream of PDT. Although no affiant actually boated on the Kill Van Kull, apparently because of the foulness of the water, several indicated that they would boat, fish or swim there if the water were cleaner.⁴ See e.g. Affidavit of Sheldon Abrams, Joint App. p. 2425.

The affiants claimed injury to their aesthetic and recreational interests because the Kill Van Kull is polluted. The affidavit of Douglas MacNeil represents the types of interests asserted. Mr. MacNeil lives in Westfield, N.J. and is a member of FOE. He stated that he hikes and birdwatches several times per year at the Kill Van Kull park, a park adjacent to the Kill Van Kull. Mr. MacNeil was particularly offended by the brown color and bad odor of the water. He stated that he would birdwatch more frequently and enjoy his recreation on the Kill Van Kull more if the water were cleaner.

These affidavits state an injury sufficient to satisfy the requirements of Article III. As the Supreme Court noted in *Sierra Club v. Morton*, 405 U.S. 727 (1972), harm to aesthetic and recreational interests is sufficient to confer standing. *Sierra Club*, 405 U.S. at 735; *Middlesex County*, 453 U.S. 1, 16-17 (1981). These injuries need not be large, an "identifiable trifle" will suffice. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n. 14. The interests asserted by the

4. For example, Andrew Gerbino stated that he would fish, clam and crab in the Kill Van Kull if the water were cleaner. Affidavit of Andrew Gerbino, Joint App. p. 2427.

plaintiffs in this case are more than trifles. The pollution in the Kill Van Kull has interfered with these plaintiffs' enjoyment of this natural resource. Since PDT has not introduced any evidence to suggest that the affiants have not legitimately stated injuries in fact to their aesthetic and recreational interests in the Kill Van Kull, PIRG has satisfied the first prong of the *Valley Forge* test. *Accord Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985) (affidavit by FOE member was sufficient to confer standing on organization where member stated that he drove on bridge over body of water and was offended by its appearance).

B. Fairly Traceable

PDT contends that PIRG has failed to demonstrate that the injuries suffered by its members are fairly traceable to PDT's exceedances of its NPDES permit. In support of its motion for summary judgment on this issue, PDT submitted the affidavit of LeRoy Sullivan, an engineering consultant, who stated that to "a reasonable scientific certainty...[PDT's] operations do not adversely affect water quality in the Kill Van Kull at or about the Kill Van Kull Park.... It is also my opinion that [PDT's] operations do not adversely affect water quality in the Kill at any other location except perhaps in some purely speculative and theoretical way." Affidavit of LeRoy Sullivan, p. 2. Joint App. p. 93. PDT also submitted the affidavit of Allen Dresdner, a professional planner and consultant, who testified to the heavily industrialized character of the Kill Van Kull and stated his opinion that the poor water conditions complained of by the plaintiffs did "not originate from Powell Duffryn nor are they related to Powell Duffryn's discharges." Affidavit of Allen Dresdner, p. 18, Joint App. p. 126.

In denying PDT's motion for summary judgment⁵, the district court stated that PIRG could "show causation merely by showing violations of the discharge permits." *PIRG I*, 627 F. Supp. at 1083. PDT asserts that this is an erroneous statement of the law of standing and that *Valley Forge* and its progeny require a close causal link between the content of a defendant's effluent and the harm complained of by the plaintiffs.⁶ Although we agree that a permit exceedance alone is not sufficient to satisfy the second prong of *Valley Forge*, the facts are sufficient here to trace PIRG's injuries to PDT's discharges.

The requirement that plaintiff's injuries be "fairly traceable" to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs. A plaintiff need not prove causation with absolute scientific rigor to defeat a motion for summary

5. To the extent that PDT argues that summary judgment was inappropriate because of a dispute of material fact, we disagree. It was PDT which filed the motion to dismiss which was subsequently converted into a motion for summary judgment. PDT represented in filing this motion that PIRG had failed as a matter of law to establish standing. It cannot now argue that facts were in dispute and that a trial was necessary.

6. We note that *Valley Forge* itself provides little guidance, since the Court found that the plaintiffs had failed to establish injury in fact, and so never reached the question of causation. *Valley Forge*, 454 U.S. at 436.

judgment.⁷ The "fairly traceable" requirement of the *Valley Forge* test is not equivalent to a requirement of tort causation. *Cf. Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78 (1978).

The standing requirement ensures that parties will not "convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Valley Forge*, 454 U.S. at 473 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). In order to demonstrate that they are more than "concerned bystanders," plaintiffs need only show that there is a "substantial likelihood" that defendant's conduct caused plaintiffs' harm. *Duke Power Co.*, 438 U.S. at 75 n. 20 (1978). In a Clean Water Act case, this likelihood may be established by showing that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.⁸

7. Of course, plaintiffs must, if challenged, prove their allegations at trial. In this case, however, PDT waived its right to cross-examine PIRG's members at trial and stipulated that standing should be decided based on the record as it stood at the time of the motion for summary judgment. Joint App. p. 615.

8. In many of these cases, there are several parties discharging into the affected waterway. In order to obtain standing, plaintiffs need not sue every discharger in one action, since the pollution of any one may be shown to cause some part of the injury suffered. The size of the injury is not germane to standing analysis. *SCRAP*, 412 U.S. at 689 n. 14.

This will require more than showing a mere exceedance of a permit limit. Thus if a plaintiff has alleged some harm, that the waterway is unable to support aquatic life for example, but failed to show that defendant's effluent contains pollutants that harm aquatic life, then plaintiffs would lack standing. In this case, several affiants stated that the water had an oily or greasy sheen they found offensive.⁹ PDT's permit contained limits on the oil and grease PDT could discharge in its effluent. Joint App. p. 2154. PDT's reports to the EPA indicate that PDT has discharged oil and grease in excess of these limits. Thus the aesthetic injury suffered by the plaintiffs may fairly be traced to PDT's effluent.¹⁰ PIRG has satisfied the second prong of the *Valley Forge* test.

C. Redressability

The final prong of the *Valley Forge* test requires

9. See e.g. Affidavit of Mylissa Ven Ditti, Joint App. p. p.2431 (water was brown and greasy in appearance), Affidavit of Sheldon Abrams, Joint App. p. 2425 (water had an oily sheen), Affidavit of Andrew Gerbino, Joint App. p. 2425 (water had an oily sheen).

10. Plaintiffs need not show "to a scientific certainty" that the oil they saw came from PDT's effluent. This tort-like causation is not required by Article III and is apparently an attempt by PDT to negate the strict liability standard of the Act. Since the Act forecloses PDT from raising such an argument at the liability stage, PDT attempts to raise it under the guise of standing. Thus the affidavits submitted by PDT did not entitle it to summary judgment on the issue of standing. To negate PIRG's affidavits, PDT must show that either 1) that it does not discharge oil and grease into the Kill Van Kull in exceedance of its permit or 2) plaintiffs' statements that they saw oil on the water are "in fact untrue." *SCRAP*, 412 U.S. at 689.

that plaintiffs demonstrate that their injuries are "likely to be redressed by a favorable decision." *Valley Forge*, 454 U.S. at 472 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976)). This requirement is closely related to the "fairly traceable" element. While the fairly traceable element focuses on the connection between the defendant's conduct and the plaintiff's injury, the redressibility factor focuses on the connection between the plaintiff's injury and the judicial relief sought. *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984). PDT argues that PIRG has failed to demonstrate how civil penalties and injunctive relief could redress the injuries complained of by PIRG's members. PDT is simply wrong.

The purpose of the Act is to restore the chemical, physical and biological integrity of the nation's waters. Where a plaintiff complains of harm to water quality because a defendant exceeded its permit limits, an injunction will redress that injury at least in part. If PDT complies with its permit, the pollution in the Kill Van Kull will decrease. Plaintiffs need not show that the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III.

There is also a connection between civil penalties and the injuries to PIRG's members. Where Congress has expressly granted a right of action and plaintiffs have shown "a distinct and palpable injury," plaintiffs "may invoke the general public interest in support of their claim." *Warth v. Seldin*, 422 U.S. 490, 501. The general public interest in clean waterways will be served in this case by the deterrent effect of an award of civil penalties. Penalties will deter both PDT specifically and other NPDES permit holders generally. Thus PIRG's members' injuries may be redressed by a favorable decision in this case. See *Student Public*

Interest Group of New Jersey, Inc. v. AT & T Bell Laboratories, 617 F. Supp. 1190, 1200-1 (D.N.J. 1985), accord *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 695 (4th Cir. 1989), *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109 (4th Cir. 1988), cert. denied, 109 S.Ct. 3185 (1989). Under current constitutional requirements this plaintiff has standing.

III. Statute of Limitations

The district court held that no statute of limitations should apply to citizen suits brought under the Act because to do so would contravene the substantive federal policy of the Act. PDT argues that the five year federal statute of limitations contained in 28 U.S.C. § 2462 should apply.¹¹ PIRG does not attempt to defend the district court's reasoning, but nonetheless contends that no statute of limitations should apply. PIRG argues that since section 510¹² of

11. This section provides:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462.

12. Section 510 provides, in relevant part:

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any

the Act, 33 U.S.C. § 1370, authorizes states to impose more stringent requirements on polluters than those provided by federal law, and since New Jersey imposes no limitations on similar actions brought under state environmental laws, see *New Jersey Department of Environmental Protection v. Ventron Corp.*, 182 N.J.Super. 210, 440 A.2d 455, 463 (1981), *aff'd*, 94 N.J. 473, 468 A.2d 150 (1983), the more stringent state procedural rule should control.

The Act contains no relevant statute of limitations.¹³ Ordinarily, we would look to state law and borrow the most relevant state limitations period. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983). But where state statutes of limitation are "unsatisfactory vehicles for the enforcement of federal law..., it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." *Id.* at 161. Especially where there is a relevant federal statute of limitations, courts need not borrow from state law. *Occidental Life Ins. Co. v.*

State...to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that... such State...may not adopt or enforce any effluent limitation...which is less stringent...than the effluent limitations...under [the Act].

33 U.S.C. § 1370.

13. The Act does contain a limitations period for actions brought to challenge EPA's rules or decisions. 33 U.S.C. § 1369(b)(1).

EEOC, 432 U.S. 355, 367 (1977), *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

The federal statute identified by PDT in this case is relevant, because citizen suits under the Act are brought to enforce a civil fine. By its terms, it would apply to an EPA proceeding under the Act. See *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987). Since plaintiffs in a citizen suit are acting as an adjunct to government enforcement actions, *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 108 S.Ct. 376, 383 (1987), citizens should be subject to the same limitations period as the government. The Act envisions a scheme whereby citizen suits supplement government efforts. Thus applying a different state law could frustrate this scheme by allowing citizens to bring suits where the government would be barred or vice versa.

The Court of Appeals for the Ninth Circuit has employed similar reasoning in *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987) to conclude that section 2462, rather than the California statute of limitations contained in the Porter-Cologne Water Quality Act, Cal. Code Civ. Proc. § 338(9), should apply to citizen suits under the Act. Analogizing a Clean Water Act citizen suit to a government enforcement or *qui tam* action, the court noted that citizen suit plaintiffs do not personally benefit from the suit. Since citizen plaintiffs "effectively stand in the shoes of the EPA," the court concluded that the federal statute of limitations should apply. *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d at 1522. This holding is consistent with decisions in other jurisdictions. See e.g. *Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 287 (N.D.N.Y. 1986), *Connecticut Fund for the Environment v. Job Plating Co.*, 623 F. Supp. 207, 213 (D.Conn. 1985), *Friends*

of the Earth v. Facet Enterprises, Inc., 618 F. Supp. 532, 536 (W.D.N.Y. 1984).¹⁴

PIRG attempts to distinguish the decisions applying section 2462 by noting that they all involved state limitations periods shorter than that provided by section 2462. Thus, PIRG argues, no decision resolved the question of whether section 510 of the Act allows a state to adopt a longer limitations period than that allowed by federal law.

We are not persuaded that section 510 of the Act allows a state to adopt its own statute of limitations for citizen suits. The language of this section allows states to adopt "any requirement respecting control or abatement of pollution," so long as that requirement is not less stringent than the federal requirements. 33 U.S.C. § 1370(1)(B). We read this language as affording states considerable flexibility in setting more stringent effluent standards. Only a strained reading of this section would authorize states to set their own limitations periods for citizen FWCPA suits. Particularly since the right of citizens to sue under the Act was granted by Congress with the intent "to supplement rather than supplant governmental action," *Gwaltney*, 108 S.Ct. at 383, we conclude that

14. We note, however, that the New Jersey district courts have consistently held for various reasons that no statute of limitations applies to citizen suits under the Act. See *Public Interest Research Group of New Jersey v. U.S. Metals Refining Co.*, 681 F. Supp. 237, 239 (D.N.J. 1987), *Student Public Interest Research Group of New Jersey v. AT & T Bell Laboratories*, 617 F. Supp. 1190, 1202 (D.N.J. 1985), *Student Public Interest Research Group of New Jersey v. Tenneco Polymers*, 602 F. Supp. 1394, 1398-99 (D.N.J. 1985). But see, *Public Interest Research Group of New Jersey v. Witco Chemical Corp.*, C.A. No. 89-3146 (D.N.J. May 17, 1990) (applying five year statute of limitations).

section 510 does not implicitly authorize states to allow citizen suits where the EPA itself would be time barred.¹⁵

PIRG argues that if a five year statute of limitations is applied to this action, the time period should begin when the defendant filed its DMRs rather than at the time of the discharge. This makes sense since the responsibility for monitoring effluent rests with the defendant, 33 U.S.C. § 1318(a)(4)(A), and the public cannot reasonably be deemed to have known about any violation until the permit holder files its DMRs. Thus we hold that the five year statute of limitations period does not begin to run until the DMRs listing the violations are filed. *Accord Atlantic States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 287 (N.D.N.Y. 1986).

The Act requires citizen plaintiffs to give sixty days notice to the EPA and the state where the alleged violations occurred before filing a complaint. 33 U.S.C. § 1365(b)(1)(B). PIRG urges that the limitations period should be tolled from the time the plaintiffs file their sixty day notice letter until the complaint is filed. Since prior notice to an administrative agency is a jurisdictional prerequisite to filing suit, *cf. Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1011 (3d Cir. 1988), equitable considerations favor tolling the statute of limitations during the sixty

15. PIRG's argument that application of section 2462 will interfere with the New Jersey enforcement scheme is without merit. The NJDEP may bring actions under New Jersey environmental law subject to New Jersey procedural rules. But citizens wishing to bring actions under the federal Act must satisfy the five year statute of limitations. In light of *Gwaltney's* recognition that citizens may not sue for wholly past violations, this issue only arises where, as here, there is a long history of permit exceedances.

days while the EPA considers whether to prosecute. We see no reason why citizen plaintiffs should be faced with what is effectively a two month shorter limitations period than that binding the EPA.¹⁶ *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1524 (9th Cir. 1987). The statute should not, however, be tolled until the lawsuit is actually filed. That would permit citizens to file their sixty day notice and then delay filing the actual lawsuit as long as they wished, effectively extending the limitations period beyond that applicable to the government. *Id.* at 1524 n. 5. Thus, we conclude that the statute of limitations is tolled only for the statutory sixty day notice period. We will reverse the district court to the extent it held that no statute of limitations applies to citizen suits under the Act and remand for adjustment of the penalty award.¹⁷

IV. Summary Judgment on Liability

16. The notice requirement was imposed by Congress to allow government enforcement agencies to prosecute permit violations of which they may not have been aware. S.Rep. No. 414, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3745.

17. This lawsuit was filed on January 27, 1984. The violations alleged by plaintiffs date from September 1977. PDT contends that a five year limitations period will mean eighteen violations will be barred. Applying the foregoing rules, we calculate that only violations reported before November 28, 1978 are time barred. This means PIRG cannot obtain civil penalties for violations 1 through 12. On remand, the district court should adjust the penalty award accordingly.

In reviewing a grant of summary judgment, we apply the same test as the district court should have used initially. *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1093 (3d Cir. 1988). PDT raises numerous objections to the summary judgment on the issue of liability. Although characterized by PDT as disputes of fact, the objections are actually disputes of law.¹⁸ We will consider each objection in turn.

A. The Single Operational Upset Defense

When Congress amended the Act in 1987, it added the following language to sections 309(c)(5), (d), & (g)(3):

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

33 U.S.C. § 1319(c)(5), (d), & (g)(3).¹⁹

PDT seizes upon this language and argues that, in all

18. PDT does raise some factual issues. These mostly concern PIRG's reading of the laboratory reports and DMRs PDT is required by law to keep. 40 C.F.R. § 122.41(j) (1989). We have carefully reviewed the record before the district court, keeping in mind the Supreme Court's admonition that a dispute of fact is material "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). We conclude that PDT failed to create a material dispute of fact so as to preclude entry of summary judgment.

19. The language in subsection 309(d) applies to civil penalties, the other subsections apply to criminal penalties and administrative actions.

instances where one discharge violated more than one permit parameter, the district court erred by finding liability for more than one violation. PDT claims that this language indicates Congress intended that simultaneous violations in a single non-complying discharge constitute only a single violation.

We note initially that the single operational upset ("SOU") defense is not a defense to liability, but relates only to the amount of penalties the district court may impose.²⁰ The SOU defense is contained in subsections relating to calculation of penalties, see e.g. 33 U.S.C. § 1319(d), and by its terms it is limited to the subsection in which it is contained. Thus even if we were to find that PDT was entitled to invoke the SOU defense, this would not preclude summary judgment on liability. Since it could effect the calculation of penalties, we will consider PDT's argument. For the reasons that follow, we conclude that PDT is not entitled to the SOU defense.²¹

We do not agree with PDT that the SOU defense

20. Thus the SOU defense differs from the "upset" defense provided by the EPA's regulations. 40 C.F.R. § 122.41(n) (1989). This "upset" defense may be raised as an affirmative defense to liability. To qualify for this defense, a permit holder must meet certain requirements, including reporting the incident to the EPA within 24 hours. 40 C.F.R. § 122.41(n)(3)(iii) (1989). PDT argued before the district court that it was entitled to this defense. The district court found that PDT had failed to provide any evidence that it qualified for the "upset" defense. *PIRG I*, 627 F. Supp. at 1087.

21. In light of our determination that the SOU defense is not available to PDT for any of the exceedances, we need not reach the question of whether the amendment to section 1319(d) should be applied retroactively.

indicates Congress intends that any single discharge which violates several permit parameters be counted as a single violation.²² The statute states that a "single operational upset," not any "single non-complying discharge," should be counted as one violation. While neither the statute nor the legislative history further define "single operational upset," we conclude that an "upset" means some unusual or extraordinary event. We are guided in our interpretation of this ambiguous statutory language by the reasonable interpretation given this term by the EPA. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984).

The EPA has defined "single operational upset" as:

An exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one Clean Water Act effluent discharge pollutant parameter. Single operational upset does not include...noncompliance to the extent caused

22. PDT relies on *United States v. Detrex Chemical Indus., Inc.*, 393 F. Supp. 735 (N.D. Ohio 1975) and the original district court opinion in *Gwaltney I*, 611 F. Supp. 1542 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *rev'd on other grounds*, 484 U.S. 49 (1987). We do not find either of those cases relevant to this appeal. Those cases construed the pre-1987 language of section 1319(d), which specified that the maximum penalty was "not to exceed \$10,000 per day of such violation." In the 1987 amendments to the Act, Congress amended the statutory language in section 1319(d) to allow a maximum penalty "not to exceed \$25,000 per day for each violation." This amendment clarified that violations of the Act were to be counted on a parameter by parameter basis. *Atlantic States Legal Foundation v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137-39 (11th Cir. 1990).

by improperly designed or inadequate treatment facilities.

EPA Guidance Interpreting "Single Operational Upset." Addendum B to Brief of Intervenor EPA at p. 9.

This Guidance further defines an "exceptional" incident as a "non-routine malfunctioning of an otherwise generally compliant facility." *Id.*

PDT introduced no evidence that the violations in this case were the result of anything except PDT's own recalcitrance. There was no evidence that a sudden violent storm, or bursting tank, or other exceptional event caused these exceedances. It is disingenuous at best for PDT to argue that it was in a near continual state of operational upset for the six years of violations involved in this suit. We conclude that PDT has not demonstrated that it is entitled to the SOU defense for these violations.

B. Violations of the BOD and TSS Parameters

PDT's permit contained limitations on the discharge of BOD (biochemical oxygen demand) and TSS (total suspended solids). PDT argues that any exceedances of these parameters should not result in liability under the Act,²³ since BOD and TSS limitations apply only to continuous dischargers and PDT discharged intermittently until May 1987.²⁴ In

23. PDT has not cited any case, statute or regulation to support its contention that the limits should not apply to intermittent dischargers.

24. With the installation of the Zimpro water treatment system in May 1987, PDT began discharging on a continuous basis. Since 1987, PDT has violated its BOD and TSS limitations twenty-two times.

support of this argument, PDT submitted the affidavits of Dr. Jeffrey Waxman, an environmental consultant, Ronald Sprague, Corporate Secretary of PDT, and Leroy Sullivan.²⁵

PDT asserts that BOD and TSS limits were automatically and inadvertently inserted in all permits, rather than just the permits of continuous dischargers. Whatever the merits of PDT's argument on the applicability of the BOD and TSS limits, section 1369(b)(2) of the Act clearly states that EPA action in issuing a permit "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2). Under New Jersey law, a permittee wishing to challenge a condition of a permit must request agency review within thirty days of the receipt of the permit. N.J. Admin. Code tit. 7, § 14A-8.9. The final agency determination may be appealed to the Appellate Division of the New Jersey Superior Court. N.J. R. App. P. 2:2-3(a).²⁶

25. PDT also attempts to rely on the testimony of former EPA employee Marian Casper to support its argument that BOD and TSS limits did not apply to PDT. This testimony was not before the district court at the liability stage, since Ms. Casper testified only at the trial on penalties.

26. Because authority for administering the NPDES permit program has been delegated to New Jersey, the requirements of New Jersey law would control. See 33 U.S.C. § 1342(c). Under federal law, PDT would have had 120 days to appeal its permit to this court. See 33 U.S.C. § 1369(b)(1); but see *Connecticut Fund for the Environment v. Job Plating Co.*, 623 F. Supp. 207, 216 (D.Conn. 1985) (permittee could have challenged permit in both state agency and federal court). This distinction is academic, since PDT failed to appeal its permit terms to anyone.

Because PDT never challenged the BOD and TSS limits in its permit until PIRG brought this enforcement action, it may not challenge them now. By failing to challenge a permit in an agency proceeding, PDT has lost "forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties." *Texas Mun. Power Agency v. EPA*, 836 F.2d 1482, 1484-85 (5th Cir. 1988) (quoting *Texas Mun. Power Agency v. EPA*, 799 F.2d 173, 175 (5th Cir. 1986)). Accord *Connecticut Fund for the Environment v. Job Plating Co.*, 623 F. Supp. 207, 216-17 (D.Conn. 1985). The district court properly found that PDT was liable for exceeding the BOD and TSS parameters in its permits.²⁷

C. Counting of Violations

PDT argues that PIRG "double counted" violations and that the district court improperly granted summary judgment for these violations. PDT identifies essentially two varieties of overcounting. First, a single reported exceedance for a pollutant was counted as a violation of both the average concentration limit and the maximum concentration limit for that pollutant. Second, a single reported exceedance for a pollutant was counted as a violation of both the seven day discharge limit and the thirty day discharge limit for that pollutant.

PDT's first argument is easily refuted. PDT's permits provide limits for both the daily average and

27. PDT's claim that liability for BOD and TSS violations would violate due process is utterly meritless. Due process was available to PDT, in the form of an administrative challenge to the permit. PDT was not denied due process; it simply failed to use the process available to it.

daily maximum concentration of certain pollutants. See e.g. 1978 NPDES Permit, Joint App. p. 2145. These are clearly separate limitations and we see no reason why PDT should not be penalized separately for violating each limitation.²⁸ While the permit requires that PDT test a minimum of three effluent samples there is no limit on the maximum number of samples that PDT may test. Therefore, if one sample contained a concentration in excess of the maximum for a particular pollutant, PDT could have taken measures to clean up its discharge and take more samples in the hope that later samples would have lower concentrations and so bring the daily average within the permit limits. PDT did not do so and therefore is subject to penalties for violating both the average and maximum concentration limits.

The second variety of overcounting alleged by PDT involves multiple limits for the same parameter. PDT contends that the district court erred by counting a single exceedance as a violation of both the seven day average limit and the thirty day average limit. PDT argues that section 1319(d) of the Act prohibits multiple penalties for such a "single operational upset." As we held, the single operational upset defense of section 1319(d) is not available to PDT in this case. PDT's argument on this point is without

²⁸ . . . We have already rejected PDT's argument that violations may not be counted on a parameter by parameter basis. See *supra* note 22. To the extent PDT argues that the SOU defense of 33 U.S.C. § 1319(d) precludes such "double counting," we have already concluded that the defense is not available to PDT.

merit.²⁹

For the foregoing reasons, we conclude that the district court did not err by granting summary judgment against PDT.

V. Calculation of Civil Penalties

The Act sets forth several factors a district court must consider when imposing civil penalties. These factors are enumerated in section 309(d) of the Act:

In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319(d).

After a bench trial on the issue of penalties, the district court assessed the maximum penalty for each of PDT's violations. The court then reduced the total by \$1,000,000 because the EPA and NJDEP failed to diligently prosecute PDT. PDT argues that the district court's factual findings on the seriousness of the violations and the economic benefit of noncompliance to PDT were clearly erroneous. PIRG argues that the

29. There is, however, the interesting question of whether the district court *undercounted* the number of violations in this case. The Eleventh Circuit has interpreted the language of section 1319(d) as requiring that an exceedance of a thirty day average limit be counted as *thirty* violations. *Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1139-40 (11th Cir. 1990). We do not consider whether the district court in this case erred by counting an exceedance of the thirty day limit as one violation, since PIRG expressly waived this argument at oral argument. Transcript of Oral Arg. at p. 56.

district court erred as a matter of law by reducing the penalty because of the nonfeasance of governmental agencies. We will consider each contention in turn.

A. Factual Finding on Seriousness of the Violations

In considering the seriousness of PDT's violations, the district court stressed that there were a very large number of violations and that many violations exceeded the permit limits by 100 to 1000 percent. *PIRG II*, 720 F. Supp. at 1161, 1163. The court also noted that at least ten violations involved toxic substances and many others involved pollutants known to harm marine life. Based on these factors, the court concluded that PDT's "386 violations were very serious in nature." *PIRG II*, 720 F. Supp. at 1163.

PDT argues that the district court's factual finding of seriousness was clearly erroneous. "Under the clearly erroneous standard, a finding of fact may be reversed only if it is completely devoid of a credible evidentiary basis or bears no rational relationship to the supporting data." *American Home Products Corp. v. Barr Laboratories, Inc.*, 834 F.2d 368, 370-71 (3d Cir. 1987).³⁰ Despite this extremely limited standard of review, PDT contends that the district court's finding is erroneous because there was no particularized showing of the harm PDT's effluent caused in the Kill Van Kull.

The district court's finding is amply supported by the record. PDT's argument that its discharges did

30. PDT attempts to avoid this deferential standard of review by asserting that plenary review is appropriate where the district court's determination was based on documentary evidence. Appellant's Brief at p. 44. Since Fed. R. Civ. P. 52(a) was amended in 1985 to include findings based on documentary evidence, the outdated cases cited by PDT are inapposite.

not seriously harm the Kill Van Kull is contradicted by EPA and NJDEP documents detailing the environmental harm caused by each pollutant PDT discharged. The district court properly relied upon these reports, *PIRG II*, 720 F. Supp. at 1161-62, and the large number of gross exceedances in concluding that PDT's violations were serious.

B. Factual Finding on Economic Benefit

PIRG offered several theories for calculating how PDT profited by not complying with the Act; all based on the argument that PDT could have hauled its wastewater off-site for treatment while it constructed a treatment facility. In considering the economic benefit to PDT, the district court concluded that PDT's benefit under any proposed theory was "far in excess of the statutory maximum [penalty]." *PIRG II*, 720 F. Supp. at 1163. PDT argues that this finding is clearly erroneous.

Precise economic benefit to a polluter may be difficult to prove. The Senate Report accompanying the 1987 amendment that added the economic benefit factor to section 309(d) recognized that a reasonable approximation of economic benefit is sufficient to meet plaintiff's burden for this factor.

Violators should not be able to obtain an economic benefit vis-a-vis their competitors due to their noncompliance with environmental laws. The determination of economic benefit or other factors will not require an elaborate or burdensome evidentiary showing. *Reasonable approximations of economic benefit will suffice.*

S.Rep. No. 50, 99th Cong., 1st Sess. 25 (1985) (emphasis supplied).

In determining economic benefit, the district

court found as a matter of fact that facilities for off-site treatment of PDT's wastewater did not exist prior to 1982. Relying on the testimony of PDT's expert, Leroy Sullivan, the district court found that from 1982 until 1987 PDT could have hauled its wastewater to a DuPont facility in South Jersey for treatment. The district court calculated economic benefit by relying on a 1985 letter from Sullivan to Ronald Sprague, corporate secretary of PDT, detailing the possibility of hauling wastewater to DuPont at a cost of \$0.11 to \$0.12 per gallon. The district court used Sullivan's estimate of the wastewater discharged by PDT to calculate an economic benefit in excess of \$4,205,000. *PIRG II*, 720 F. Supp. at 1162-63.

PDT, understandably upset by a penalty based on testimony of its own experts and corporate officers, argues that "plaintiffs cannot fairly use [the Sullivan] letter" to prove that off-site treatment was possible and therefore the district court's finding of economic benefit is clearly erroneous. To the contrary, we find that the district court properly used the Sullivan letter and the testimony of Sullivan at the bench trial. Indeed, the district court would have been remiss if it failed to consider these highly probative pieces of evidence. The district court's finding that the economic benefit to PDT exceeded the statutory maximum penalty of \$4,205,000 is not clearly erroneous.

C. Reduction of the Penalty Based on the Nonfeasance of the EPA and NJDEP

The district court reduced the total penalty in this case, stating:

With regard to defendant's "good faith" attempts to comply with the Act, the Court will adjust the statutory maximum downwards by \$1,000,000.00 *because of the actions and/or non-actions taken on behalf of the United*

States Environmental Protection Agency and the New Jersey Department of Environmental Protection. The Court finds that had they acted more diligently in making defendant comply, the violations in this case would have ceased long ago. Therefore, these two governmental bodies are partially to blame for the defendant's lack of compliance for the years at issue.

PIRG II, 720 F. Supp. at 1166-67 (emphasis supplied). PIRG and Intervenor EPA argue that the district court erred as a matter of law by using the nonfeasance of governmental bodies to support adjusting PDT's penalty. We exercise plenary review over this question of law.

PIRG and intervenor EPA claim that the district court erred by even considering the inaction of NJDEP and EPA. They point out that section 1319(d) specifically lists what a district court may consider when setting penalties and that the government's lack of diligence in prosecuting permit violators is not among those factors. PIRG and EPA ignore, however, the fact that the statute allows the district court to consider "such other matters as justice may require." 33 U.S.C. § 1319(d). We must consider whether the district court could properly consider the nonfeasance of the EPA and NJDEP under this factor.

PIRG contends that, since government inaction is a prerequisite to a citizen suit under the Act, 33 U.S.C. § 1365(b)(1)(B) ("No action may be commenced...if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action"), the district court should not reduce the penalty amount because of the EPA's and NJDEP's lack of diligence. We agree with PIRG that mere failure by governmental agencies to prosecute an NPDES permit holder does not allow a court to reduce a

penalty. Nevertheless, there may be instances where the district court may consider a government agency's inaction and the permittee's reaction when setting civil penalties in a citizen suit. In a case where a defendant has failed in a good faith attempt to comply with its permit because of technical or economic problems and the EPA has affirmatively recognized and excused noncompliance, justice may require that a court adjust the penalty amount.

In this case, we conclude that the district court did not find that justice required a reduction. The court made the penalty reduction "[w]ith regard to defendant's 'good faith.'" *PIRG II*, 720 F. Supp. at 1166. This directly contradicts the district court's earlier conclusion. The district court carefully reviewed the communication between PDT and EPA during the six year period involved in this suit and concluded that PDT's actions did not rise "to the level of 'good faith,'" and that "defendant, motivated possibly by greed or apathy, chose to procrastinate." *PIRG II*, 720 F. Supp. at 1165. In light of this finding, the district court's reduction of the penalty cannot be even impliedly based on the "as justice may require" factor.³¹ Since PDT did not make good faith efforts to comply with the Act, the district court erred by reducing the penalty because of the EPA's inaction. We will reverse the district court's order as to the amount of penalty and remand for recalculation of the penalty without the reduction.

VI. The Trust Fund

The district court determined that paying the civil

31. In addition, the correspondence between PDT and EPA would not support a finding that the EPA excused PDT's noncompliance. This correspondence at best indicates that EPA acquiesced in PDT's footdragging.

penalties into the United States Treasury would not satisfy the purposes of the Act, and instead ordered that the penalties be paid into a trust fund. This trust fund would then be used "to directly impact environmental problems in New Jersey." *PIRG II*, 720 F. Supp. at 1168.

Neither party appealed this portion of the district court's order. We granted leave for EPA to intervene to contest this issue. EPA argues that all civil penalties assessed pursuant to the Act must be paid to the United States Treasury. PIRG counters that the district court could, in the exercise of its equitable jurisdiction, create a trust fund. Our review of this legal question is plenary.

The Act itself does not specify where the civil penalties are to be paid. The legislative history of the citizen suit provision, however, makes clear that Congress intended that the penalties be paid to the Treasury. "Any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant." H. Rep. No. 92-911, 92d Cong., 2d Sess. 133, reprinted in 1972 U.S. Code Cong. & Admin. News 3668. Congress intended that any penalties assessed in a citizen suit be treated as "miscellaneous receipts." Under the Miscellaneous Receipts Act, any person having custody of such public funds must deposit them in the Treasury within three days of receipt.³² 31 U.S.C. § 3302(a)(1).

32. PIRG refers to other portions of the legislative history of the Act which suggest that monies paid in settlement of suits could be used to fund environmental projects. Of course a party may compromise its claim however it sees fit. See *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Once penalties are imposed, legislative history is clear that the funds are to be paid into the Treasury.

Courts have consistently stated that penalties in citizen suits under the Act must be paid to the Treasury. See e.g. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 108 S.Ct. 376, 379 (1987) ("If the citizen prevails in such an action, the court may order injunctive relief and/or impose civil penalties payable to the United States Treasury"); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 11, 14 n. 25 (1981) ("Under the FWPCA, civil penalties, payable to the Government, also may be ordered by the court"); *Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1131 n. 5 (11th Cir. 1990) ("Penalties paid as a result of a § 1365 suit do not go to the plaintiff who instituted the suit, but rather are paid into the United States Treasury"); *Sierra Club v. Simkins Indus., inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988), cert. denied, 109 S. Ct. 3185 (1989) ("the judicial relief of civil penalties, even if payable only to the United States Department of the Treasury, is causally connected to a citizen-plaintiff's injury"); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1522 (9th Cir. 1987) ("any penalties recovered from such an action are paid into the United States Treasury"); see also *Sierra Club v. Electronic Controls Design, Inc.*, 703 F. Supp. 875 (D.Or. 1989) (district court refusing to approve consent judgment in a citizen suit under the Act where settlement provided that monies be paid to Sierra Club Legal Defense Fund).

Ordering that civil penalties be paid to the Treasury is entirely consistent with Congress' intent that citizen suits supplement the enforcement authority of the EPA. Directing that penalties be paid into the Treasury ensures that citizens bring suits to protect the public health and welfare, and not for private gain. *Middlesex County*, 453 U.S. at 18 n. 27.

PIRG nonetheless argues that the district court could have created this trust fund through its equitable jurisdiction when ordering injunctive relief. This is true and we do not reject PIRG's argument that in a Clean Water Act case, a court may fashion injunctive relief requiring a defendant to pay monies into a remedial fund, if there is a nexus between the harm and the remedy. But here, once the court labeled the money as civil penalties it could only be paid into the Treasury. Thus we will reverse that portion of the district court's order creating the trust fund and remand with instructions that the court order the penalties paid into the United States Treasury.

VII. The Permanent Injunction

As part of its final order, the district court entered the following permanent injunction:

The defendant, Powell Duffryn Terminals, Inc. (P.D. Oil and Chemical Storage, Inc.), is hereby restrained and enjoined from making or causing any discharges into the Kill Van Kull from its waste water treatment plant in Bayonne, New Jersey that exceed any limitation and/or fail in any way to comply with the terms and conditions of the National Pollution Discharge Elimination System (NPDES) Permit issued to and effecting Powell Duffryn, including its present permit, NJ 003361, any and all additions and/or amendments and any and all permits that may hereafter be issued by any agency, state or federal, that is issued pursuant to the Clean Water Act, 33 U.S.C. § 1251, *et seq.*

PIRG II, 720 F. Supp. at 1169.

The district court entered this injunction after considering equitable principles as required by

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) and *Amaco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987). A court may only enter a permanent injunction "after a showing of both irreparable injury and inadequacy of legal remedies, and a balancing of competing claims of injury and the public interest." *Natural Resources Defense Council v. Texaco Refining and Marketing, Inc.*, No. 89-3684, slip op. at 17-18 (3d Cir. filed June 20, 1990).

PDT argues that the district court erred by entering the injunction because there was no evidence of irreparable harm. PDT states that the district court denied PIRG's earlier motion for a preliminary injunction because there was no evidence of irreparable harm, and that no further evidence of harm was produced by PIRG. Thus PDT concludes that the permanent injunction could not properly be entered. We review the district court's grant of permanent injunctive relief for abuse of discretion. *International Union v. Mack Trucks, Inc.*, 820 F.2d 91, 94-5 (3d Cir. 1987).

In an unpublished opinion dated October 28, 1988, the district court denied PIRG's motion for a preliminary injunction because it was not convinced that irreparable harm was imminent. The court based this finding in part on the fact that PDT's DMRs demonstrated that its permit compliance had vastly improved. Nevertheless, since PDT had again violated its permit after the court denied PIRG's motion, the district court could properly conclude that an injunction was now appropriate. *E.P.G., University of Texas v. Camentsch*, 451 U.S. 390, 394 (1981) (grant or denial of preliminary injunction not dispositive of later request for a permanent injunction). We conclude that the district court did not abuse its discretion by issuing this permanent injunction.

PDT also challenges the scope of the injunction.

Fed. R. Civ. P. 65(d) requires injunctions to "be specific in terms" and to "describe in reasonable detail...the act or acts sought to be restrained." PDT argues that the district court order is a broad "obey the law" injunction and should be vacated for lack of specificity.

Overbroad language in an injunction that essentially orders a party to obey the law in the future may be struck from the order. *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir. 1987). Nonetheless, "the degree of particularity required of an injunction depends on the subject matter involved." *Calvin Klein*, 824 F.2d at 669 (citing *Ideal Toy Corp. v. Plawner Toy Mfg. Corp.*, 685 F.2d 78, 83 (3d Cir. 1982)).

Counsel for PIRG conceded at oral argument that the injunction in this case must be limited to the permit existing at the time of the action. Tran. Or. Arg. at 82. We will strike that portion of the injunction which purports to enjoin PDT from violating future permits. We do not find the portion of the injunction directing PDT not to discharge in violation of its current permit lacking in specificity. PDT's permit provides detailed and very specific limitations on PDT's discharge. Thus we will affirm the portion of the injunction prohibiting PDT from discharging in violation of its permit.

VII. Conclusion

For the foregoing reasons, we will reverse in part, affirm in part, and remand for further proceedings consistent with this opinion. Each party to bear its own costs.

ALDISERT, *Circuit Judge*, Concurring.

I join in the opinion of the court and write separately only to express a nagging doubt about standing.

Throughout my extensive preparation of this case including close attention at argument and discussion with my colleagues at conference, I was persuaded that the member/plaintiffs had failed to show an actual injury that was traceable to the permit violations. I am now willing to join my colleagues' view. But I feel somewhat like Lord Byron's fair maiden in *Don Juan*, c 1, dedication cxvii.

A little more she strove, and much repented,
And whispering "I will ne'er consent" -- consented.

For the purposes of this case, I am willing to agree that the live bodies met the test. But barely. The standing case put in by the Public Interest Research Group (PIRG) and Friends of the Earth (FOE) is so skinny that I am concerned seriously our discussion will not survive careful Supreme Court review. I join in this opinion, therefore, with the shakiest of jurisprudential confidence. My intrepidity, questionable as it is, is the product of abject rationalization: If the Supreme Court does not agree to review and reverse, then perhaps, if we are not absolutely correct, at least we are not totally wrong.

I.

By enacting the Federal Water Pollution Control Act (FWPCA), especially the provisions that authorize any "person or persons having an interest which is or may be adversely affected" to bring a suit "against any person . . . who is alleged to be in violation of [a discharge permit]," Congress has expressed its enthusiastic support for the cleansing of our nation's

waterways. 33 U.S.C. § 1365(g) and (a) (1). My concern is that this enthusiasm has led environmental organizations and citizen/plaintiffs to mistakenly believe they have standing to sue any time a discharge permit is violated. The Constitution and decisions of the Supreme Court and this court clearly demonstrate this is not the case. Even where statutory standing has been established, the test of constitutional standing must still be met.

I have been extremely troubled because I have a strong desire to affirm the district court judgment. I am convinced that Powell Duffryn Terminals, Inc. was a deliberate polluter and deserved appropriate penalties for many acts in violation of the conditions of its discharge permit. I find standing here only on the most questionable of grounds -- a belief that somehow the Supreme Court might be inclined to relax its stringent requirements of standing in environmental cases.

On June 27, 1990, however, the Court did not assuage my concern in handing down its decision in *Lujan v. National Wildlife Federation*, ___ U.S. ___, 58 U.S.L.W. 5077 (1990). I am quick to recognize that *Lujan* is not precise precedential authority, but it does nevertheless constitute a direction that the Court desires us to travel in environmental law cases. In *Lujan* the Court faced a question of statutory, as distinguished from constitutional, standing. Moreover, the Court construed the Federal Land Policy and Management Act of 1976, the National Environmental Policy Act of 1969 and the Administrative Procedure Act, and not the FWPCA. Yet, the Court's action sent a strong signal to all of us: It was not, repeat not, totally relaxing its standing requirements in cases affecting the environment.

The Court held that the affidavits of the National Wildlife Federation member/plaintiffs were factually

insufficient to confer standing to challenge a decision of the Bureau of Land Management. It determined that because of the lack of specificity in the affidavits of its members, the National Wildlife Federation had failed to establish that the interests of the two member/plaintiffs were affected by the bureau's actions.

The Court insisted that affidavits of the member/plaintiffs show that the "injury [the affiant] complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provisions whose violation forms the legal bases for his complaint." *Id.* at 5080. The Court directed us not to "assume[] that general averments embrace the 'specific facts' needed to sustain" standing. *Id.* at 5082. If such are the Court's requirements to prove standing under a statute, it follows, *a fortiori*, that the Court requires some stringency in meeting Article III standing, the issue before us here. Nevertheless, I still am inclined to find standing. Perhaps my wish to find standing is father to the thought, but in view of *Lujan*, I hope it is not, as John Greenleaf Whittier put it, a "wish that failed of act."

I see PIRG and FOE in the position of the old-time vaudeville performer's ad in *Variety*: "Have tux, will travel." PIRG and FOE advertised: "Have case, need live-bodied members/ plaintiffs." The questions for this court are: Were the recruited live bodies sufficiently injured to sustain this action, or more specifically, was theirs an "injury [that] fairly can be traced to the challenged action," or otherwise stated, did they "show injury in fact resulting from the action which they seek to have the court adjudicate?" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 473 (1982).

Maybe the wrong plaintiffs were recruited. Or, perhaps the plaintiffs were not sufficiently coached before their depositions. Whatever the case, constitutional standing is a serious question here.

II.

There is no doubt that standing can be based on environmental, aesthetic and non-economic injury. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). The more important question, however, is whether the individuals recruited by PIRG and FOE alleged injuries sufficient to sustain standing to bring this case.

The doctrine of standing limits the court's power to adjudicate conflicts pursuant to the "case or controversy" requirement of Article III of the Constitution. *Warth v. Seldin*, 422 U.S. 490 (1975). It was plaintiffs' burden, which cannot be waived, to establish standing as a threshold matter. *Id.* Citizen suits under the FWPCA are expressly subject to this standing requirement. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). Even when Congress has acted to confer standing to litigate a statutory claim, "the requirements of Article III remain: 'the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.'" *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 n. 22 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1973)).

The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369

U.S. 186, 204 (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require a plaintiff to:

[1] "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,"

... and [2] that the injury "fairly can be traced to the challenged action" and [3] "is likely to be redressed by a favorable decision."

Valley Forge, 454 U.S. at 471 (citations omitted).

I am even willing to concede that plaintiffs in this case have established an injury-in-fact that is redressable. My concern is with the second tier of the standing analysis mandated by *Valley Forge*, *supra*. We must decide if there is sufficient immediacy and reality to the allegations such that the injury alleged can be "fairly traced" to Powell Duffryn. To do this we must apply these constitutional standards to the findings of the district court.

III.

What makes this case so difficult is that Powell Duffryn Terminals, Inc. is an egregious wrongdoer. A persuasive argument can be made that, as a business decision, it deliberately chose to exceed the discharges allowed under the permit because, from a financial standpoint, normal profits from its operations were such as to offset any financial penalty imposed from violating terms of its permit.

The district court held that from September 1977 through November 1988, Powell Duffryn committed 386 violations involving 11 pollutants of the effluent limitations in its National Pollutant Discharge Elimination System permits:

<i>Parameter</i>	<i>Number of Violations</i>
Total Organic Carbon (TOC)	8
pH	63
Total Suspended Solids (TSS)	66
Bioassay	1
Oil and Grease	48
Hexavalent Chromium	2
Petroleum Hydrocarbons	27
Methylene Chloride	9
Phenol	1
Biochemical Oxygen Demand (BOD)	80
Chemical Oxygen Demand (COD)	81
	<hr/>
TOTAL	386

PIRG v. Powell Duffryn Terminals, 720 F. Supp. 1158, 1160-61 (1989). Many of its violations exceeded the effluent limitations in its permit by great amounts. Of the 386 violations, 260 exceeded the applicable permit limitation by over 100 percent and 86 violations exceeded the limits by more than 1,000 percent. A-19, A-3824 to A-3834. Powell Duffryn's violations involved toxic pollutants and pollutants which EPA has determined to be harmful to aquatic life.

If the receiving waters of Powell-Duffryn's discharge were crystal clear waters of a sylvan lake or an uncontaminated mountain stream, it would be easy to relate the alleged injury sustained by the member/plaintiffs to the company's discharge. But, the Kill is not the river once so eloquently described by Justice Douglas:

The river, for example, is the living symbol of all the life it sustains or nourishes -- fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are

dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water -- whether it be a fisherman, a canoeist, a zoologist, or a logger -- must be able to speak for the values which the river represents and which are threatened with destruction.

Morton, 405 U.S. at 743 (Douglas, J., dissenting). And complainants do not allege an injury like that once described by Justice Holmes:

The nuisance set forth in the bill was one which would be of international importance, -- a visible change of a great river from a pure stream into a polluted and poisoned ditch.

Missouri v. Illinois, 200 U.S. 496, 518 (1906). The brute fact is that Powell Duffryn illegally discharged pollutants into the Kill Van Kull, one of the most industrialized waterways in the United States, if not the world.

The Kill lies between Staten Island, New York and the northern shore of New Jersey. It is part of the very busy greater Port of New Jersey and New York Channel complex and it links Newark Bay, to the east, with Arthur Kill Channel to the west. The entire shore is industrialized with the exception of Kill Van Kull Park, located two miles to the west of the facility. On the shore are the Bayonne Sewage Treatment Plant and the Port Richmond Sewage Treatment Plant. These two plants discharge up to 60 million gallons of treated sewage per day on the Kill and are located within 200-300 yards of the park. A-621-622, 121.

The Kill lost its pristine beauty many years ago. It is not the same body of water that greeted Hendrick Hudson and Peter Stuyvesant. Recent history best describes the state of the Kill today. During the period

between submission of this case and the writing of these opinions the Kill has been the site of repeated gigantic oil spills from the many tankers that ply its waters. For example, on June 7, a British flag oil tanker ran aground while docking in the New Jersey side of the Kill Van Kull in New York Harbor, spilling 260,000 gallons of fuel oil into the waterway. *New York Times*, June 8, 1990, at A1, col. 5.

In was the fifth major oil spill in the area since January. . . . The recent rash of spills in Kill Van Kull and connecting Arthur Kill has brought harsh criticism of the oil industry from environmentalists and state officials. The waterways separate New Jersey from New York's Staten Island, and are along industrialized areas.

Los Angeles Times, June 8, 1990, at A3, col. 1.

What we have here is an acknowledged egregious polluter discharging into an already polluted industrial waterway located in a severely threatened ecosystem. Against this backdrop we must decide whether the pollution complained of by PIRG's and FOE's member/plaintiffs can be traced to the pollution discharged by Powell Duffryn.

IV.

At best, the testimony of PIRG's and FOE's member/plaintiffs constitutes only a gossamer case of standing. The member/plaintiffs may have been injured, but there is very shaky proof that the stated injuries were traceable to *this* polluter.

A.

Cheryl Cummings, whose family home in Bayonne, New Jersey, is one block from the Kill Van Kull, has used Kill Van Kull Park for biking and jogging for 19 years. Ms. Cummings testified that the

pollution of the Kill Van Kull has diminished her enjoyment of the Park. She described the water of the Kill Van Kull as having "a film" which is "sometimes like a rainbow or sometimes like greenish-yellow." A-483, 253. "The park is often not a pleasant place to be." A-483, 2423. *Student Public Interest Research Group of New Jersey v. P.D. Oil & Chemical Storage, Inc.*, No. 84-340, slip op. at 13 (D.C. N.J., Jan. 13, 1986) [hereinafter D.Ct. Op. I]. However, when Ms. Cummings was deposed by counsel for Powell Duffryn, she admitted:

Q. [By Mr. Edelstein] To you personally then the outcome of this lawsuit won't affect your use of the park, right?

A. [By Ms. Cummings] Correct.

In fact, she further testified that she had never read the allegations of the complaint, and -

Q. [By Mr. Edelstein] If you had been read paragraph #7 by any representative of Terris & Sunderland, would you have authorized them to use you as a person on whom they could rely for standing?

A. [By Ms. Cummings] No.

A.-257. The testimony continues:

Q. [By Mr. Edelstein] If . . . it was important that the allegations of Paragraph #7 have to be correct as to you, would you object to participating in this lawsuit?

A. [By Ms. Cummings] Yes.

A-259. Ms. Cummings in further testimony stated,

Q. [By Mr. Edelstein] Did Barbara [plaintiffs' paralegal] explain to you that the allegations in

this suit were that there was a direct adverse effect on your aesthetic, environmental, economic, recreational activities due to Powell Duffryn's discharge?

A. [By Ms. Cummings] No.

Q. If [the allegations in the suit] had been explained to you, would you have been able to join in this suit?

A. No.

Q. Would you have been able to sign the affidavit?

A. No.

A-248 to A-249.

B.

Sheldon Abrams, a member of Friends of the Earth, has noticed that the shores of the Kill Van Kull "are black and there is an oily sheen on the water" during his regular drives there. A-483, 2425. Mr. Abrams boats in Lower New York Bay, into which the Kill Van Kull flows. He stated that he would enjoy boating in New York Bay more if the water flowing into it from the Kill Van Kull were cleaner, and that he would boat and fish in the Kill Van Kull itself if it were cleaner. D.Ct. Op. I at 13-14.

Again the testimony at the deposition indicates less facts supporting standing than was found by the district court. Mr. Abrams testified that he does not own property in the vicinity of the Kill Van Kull, Upper New York Bay or Lower New York Bay and that:

Q. [By Mr. Edelstein] You don't engage in any activities along the Kill Van Kull, do you?

A. [By Mr. Abrams] No.

Mr. Abrams occasionally fishes approximately ten miles south of the Powell Duffryn site. He further testified that his alleged interest was "very generalized" and that,

Q. [By Mr. Edelstein] You can answer this specifically. Do you have any facts on which to base a personal claim that you as an individual . . . have been, are being, and will be adversely affected by this defendant's discharge?

A. [By Mr. Abrams] I have no personal claim.

A-286 to A-287.

C.

Andrew Gerbino, also a Friends of the Earth member, lives on the Staten Island side of the Kill Van Kull. He believes that the pollution of the Kill Van Kull and Lower New York Bay has decreased the value of his home. A-484, 2427.

Mr. Gerbino used to walk along the Staten Island side of the Kill Van Kull, but he no longer does because it is so polluted. Mr. Gerbino also stated that he can no longer eat any crabs or clams caught in the area, although in the past "all these waters used to be used for lobster catching, clamming, and crab catching. You don't see anyone doing that anymore." D.Ct. Op. I at 14.

Mr. Gerbino testified that occasionally he drives over the Bayonne Bridge approximately two miles west of Powell Duffryn Terminals. His only recreational activities are south of South Beach, New York, approximately thirteen miles from Powell Duffryn and the Kill Van Kull, and thus unaffected by its discharge. He agreed that his generalized assertion in this case is actually that only, "any discharge from anywhere that finds its way to Lower New York Bay

adversely affects [him]"
A-323.

D.

Melissa Ven Ditti testified that she has never used the Kill Van Kull for recreational purposes. A-395. Her only involvement is that she occasionally walks at the Kill Van Kull Park, four blocks from her family home, at a location that is approximately 1.8 miles to the west of Powell Duffryn, and there is no access from the park to the Kill. The only environmental concern affecting her use of the park is a smell. She stated that "the water in the Kill Van Kull looks polluted and greasy. It has garbage floating in it and is brown. On some days it smells. If the water were not polluted, I would swim in it." A-2431. Powell Duffryn does not cause the smell, A-2018 to A-2020, and there is no allegation or evidence that it dumped garbage in the water.

When Ms. Ven Ditti was asked by defendant, "[A]re you claiming that you have an interest which is being or will be adversely affected by this defendant's discharge," her answer was "No." A-426.

E.

Douglas MacNeil said that his activities were birdwatching at the park about five times a year, almost two miles from Powell Duffryn. His major complaint:

As a birdwatcher, which is my main recreational activity in this area, if the waters are a certain quality, there will be more or less wildlife. If there's more, than it's better for me.

Besides that, if the waters are unappealing to me as an individual, it will inhibit me from using the area for birdwatching. In fact, it does. I don't

come here as often as I might if I felt the water was better.

A-357.

He further testified, however, that he possessed no facts indicating that Powell Duffryn's discharge adversely affected him, and that "no one said that its discharge directly [injures him] and I don't assert it." A-347 to A-348.

V.

What troubles me from the testimony is any indication that the injury-in-fact was fairly traceable. Each member/plaintiff complained of pollution in general. There was very little, if any, attempt to link the injuries alleged to the pollution caused by Powell Duffryn. Even if I concede that the individual plaintiffs were injured by the pollution in the Kill, no individual plaintiff was able to say that in this highly polluted waterway, the specific condition that was the object of his or her complaint was caused by Powell Duffryn.

The two sewage treatment plants' daily run-off consisted of 60 million gallons of treated sewage. The oil spills, the chemical processing facilities and the heavy ocean traffic have all contributed to this pollution. Yet, we as a court are faced with a lone defendant.

I believe that the foregoing is a fair summary of the evidence of the injuries and the "injury in fact resulting from the action they seek to have the court adjudicate." *Valley Forge*, 454 U.S. at 472-474. Is it enough? I'm not sure. Were this not an environment case, it certainly would not be. I come down on the side of standing with stated qualms that are soothed somewhat by the notion that the evolving precepts of standing are perhaps expanded a bit when at stake

are the great public policy considerations of insults to our environment.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5831

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY,
INC. and FRIENDS OF THE EARTH

V.

POWELL DUFFRYN TERMINALS INC.,

Appellant

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Intervenor

No. 89-5851

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY,
INC. and FRIENDS OF THE EARTH,

Appellants

V.

POWELL DUFFRYN TERMINALS INC.

No. 89-5861

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY,
INC. and FRIENDS OF THE EARTH

V.

POWELL DUFFRYN TERMINALS INC.

WILLIAM R. REILLY, in his capacity as Administrator,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 84-00340)

Nos. 89-5831, 89-5851 and 89-5861

Page 2

Present: SCIRICA, NYGAARD and ALDISERT, *Circuit Judges*

JUDGMENT

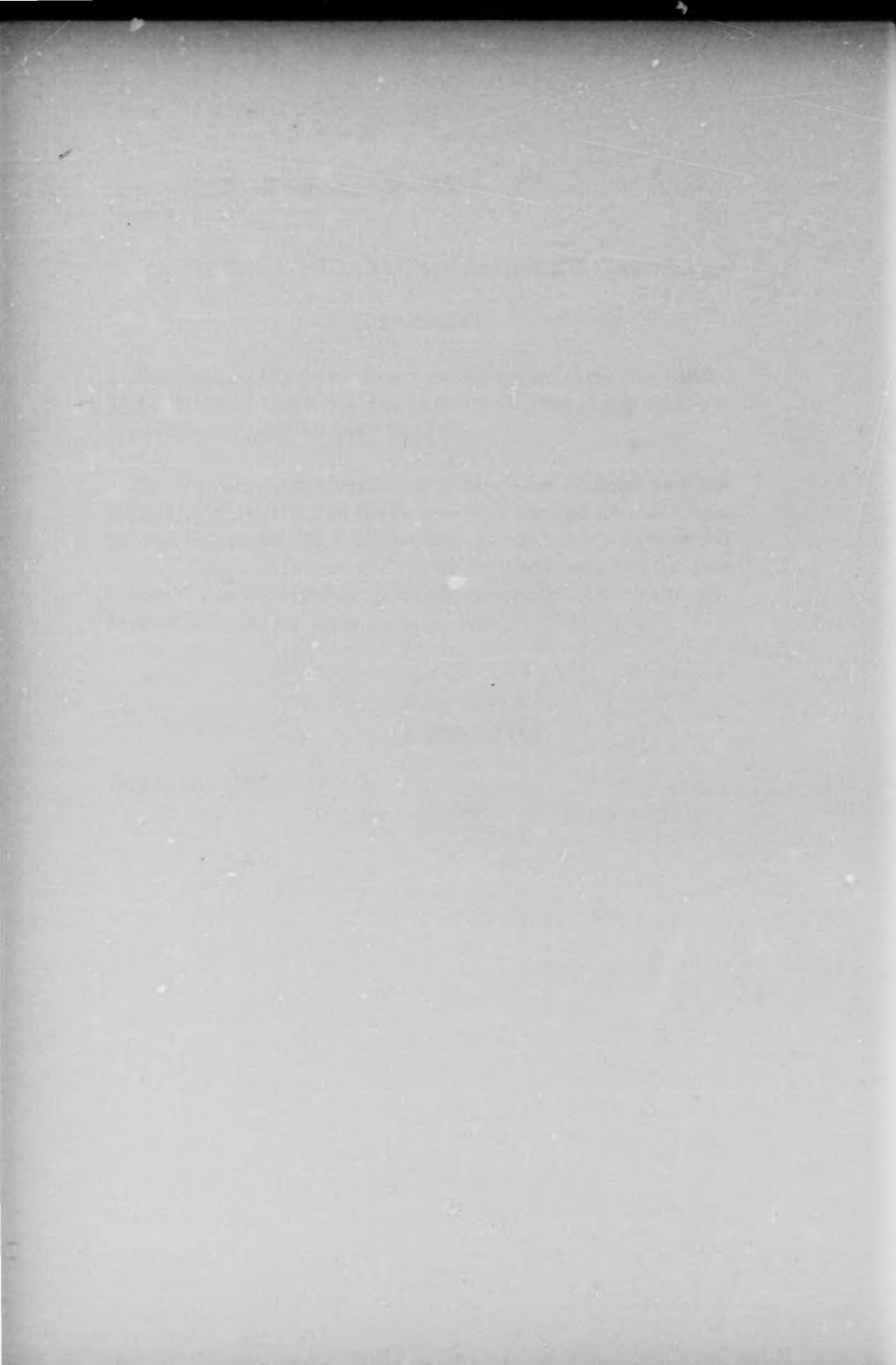
This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on May 21, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 20, 1989, be, and the same is hereby reversed in part, affirmed in part and the cause is remanded to the said District Court for further proceedings consistent with the opinion of this Court. Each party to bear its own costs.

Attest:
Sally Mvros
Clerk

August 20, 1990

APPENDIX B



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PIRG, et al,	:	CIVIL ACTION
	:	NO. 84-340
Plaintiffs,	:	
	:	HON. NICHOLAS
v.	:	H. POLITAN
	:	
POWELL DUFFRYN TERMINALS,	:	ORDER
INC. (P.D. Oil & Chemical Storage,	:	
Inc.),	:	
	:	
Defendant.	:	

For the reasons outlined in this Court's Opinion, dated September 19, 1989.

IT IS on this 19th day of September, 1989,

ORDERED that:

1. The defendant, Powell Duffryn Terminals, Inc. (P.D. Oil & Chemical Storage, Inc.), shall pay as a civil penalty for violations of its National Pollutant Discharge Elimination System (NPDES) Permit the sum of \$3,205,000.00.
2. The defendant, Powell Duffryn Terminals, Inc. (P.D. Oil & Chemical Storage, Inc.), is hereby restrained and enjoined from making or causing any discharges into the Kill Van Kull from its waste water treatment plant in Bayonne, New Jersey that exceed any limitation and/or fail in any way to comply with the terms and conditions of the National Pollutant Discharge

Elimination System (NPDES) Permit issued to and effecting Powell Duffryn, including its present permit, NJ 003361, any and all additions and/or amendments and any and all permits that may hereafter be issued by any agency, state or federal, that is issued pursuant to the Clean Water Act, 33 U.S.C. § 1251, *et seq.*

3. MORRIS PASHMAN, DONALD A. ROBINSON, and JOEL A. PISANO, are hereby appointed Trustees to receive the penalties assessed against the defendant pursuant to this Order and accompanying Opinion, to investigate ways in which said monies may be disbursed to implement the intent of the Opinion and Order and to disburse said funds pursuant to further order of this Court.

4. Pursuant to 33 U.S.C. § 1365 (d) which provides that the Court "may award costs of litigation (including reasonable attorneys' and expert witness fees) to any party, when the Court determines such an award is appropriate", plaintiff is directed, within thirty (30) days of this Opinion and Order, to submit to the Court affidavits detailing services rendered and costs incurred in connection with this suit. Defendant will be given an additional twenty (20) days to respond to plaintiffs' affidavits. After receipt of the parties' submissions, the Court will render an appropriate award with regard to fees.

/s/ Nicholas H. Politan

NICHOLAS H. POLITAN
U.S.D.J.

FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PIRG, et al,	:	CIVIL ACTION
	:	NO. 84-340
Plaintiffs,	:	
	:	HON. NICHOLAS
v.	:	H. POLITAN
	:	
POWELL DUFFRYN TERMINALS,	:	O P I N I O N
INC. (P.D. Oil & Chemical Storage,	:	
Inc.),	:	
	:	
Defendant.	:	

POLITAN, District Judge

APPEARANCES:

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The case before this Court presents another chapter in the never ending American environmental tragedy. A recalcitrant company in the private sector of the economy combined with the lethargic enforcement of the applicable statutes and regulations by the New Jersey Department of Environmental Protection and the Federal Environmental Protection Agency, has caused a continuing, if not constant, 11 year contribution to the pollution of the Kill Van Kull. It is indeed sad that none of the participants cared sufficiently about the public trust - the environment - to take meaningful steps to avert the tragedy. This Court will not stand idly by to either, explicitly or tacitly, condone such inaction. For the reasons hereafter set forth, significant monetary penalties are necessary.

Before the Court is the question of the amount of civil penalties to be assessed against defendant, Powell Duffryn Terminals, Inc., for polluting the Kill Van Kull in violation of the Clean Water Act, 33 U.S.C. §§ 1251, *et seq* (the "Act"). Plaintiffs also seek a permanent injunction prohibiting defendant from violating its National Pollutant Discharge Elimination System/ New Jersey Pollutant Discharge Elimination System ("NPDES/ NJDPDES"), Permit No. NJ 0003361.

By Orders dated January 13, 1986, March 13, 1987, and May 4, 1989, this Court determined that defendant had violated its Permit for a total of 386 times. Plaintiffs argue that the defendant should be fined the statutory maximum penalty which, in this case, is \$4,205,000.00. The defendants counter that the assessment of civil penalties is discretionary with the Court and none are warranted in this case.

Section 505(a) of the Act, 33 U.S.C. 1365(a) authorizes this Court to assess "any appropriate civil penalties under Section 309(d) of this Act." Section 309(d), 33 U.S.C. 1319(d), prior to its amendment in 1987 provided:

Any person who violates §§ 301, 302, 306, 307, or 308 of this Act, [or] any permit condition or limitation implementing any of such sections in a permit issued under § 402 of this Act by the Administrator . . . shall

be subject to a civil penalty not to exceed \$10,000.00 per day of such violation.

Consequently, each violation of the NPDES permit limitation, prior to the 1987 amendments, subjects the defendant to a statutory maximum penalty of \$10,000.00 per violation. However, in 1987 Congress increased the statutory maximum to \$25,000.00. Therefore, defendant's violations occurring on or after February 4, 1987 are subject to a penalty of up to \$25,000.00. Of the 386 violations, 363 of them occurred prior to February 4, 1987; 23 occurred after that date. Defendant is therefore liable for a maximum penalty of \$4,205,000.00

Section 309(d) of the Act requires the Court to consider specific factors in determining the appropriate civil penalty to be assessed for violations of the Act.

In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violations, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

§ 309(d), 33 U.S.C. § 1319(d).

The Court held a non-jury trial on the issue of what, if any, monetary penalty should be assessed against defendant and what, if any, injunctive or other equitable relief should be granted. Both parties have submitted extensive proposed Findings of Fact and Conclusions of Law. In the interests of clarity, I will first set forth my factual determinations and then proceed to the legal conclusions.

Plaintiffs Public Interest Research Group of New Jersey and Friends of the Earth, are non-profit corporations committed to environmental issues. Defendant P.D. Oil & Chemical Storage, Inc., operates a bulk chemical storage and transfer facility in Bayonne, New Jersey. Defendant's facility "receives bulk liquid commodities owned by others and holds them in storage tanks

for loading, upon instruction from the commodity owners, to rail cars, tank trucks or ocean going tankers [via the Kill Van Kull]." *SPIRG v. P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1080 (D.N.J. 1986). Between September 1977 and November 1988, defendant committed 386 violations of the effluent limitations in its 1974, 1981 and 1986 permits. These violations are summarized in the following table:

Parameter	Number of Violations
Total Organic Carbon (TOC)	8
pH	63
Total Suspended Solids (TSS)	66
Bioassay	1
Oil and Grease	48
Hexavalent chromium	2
Petroleum Hydrocarbons	27
Methylene Chloride	9
Phenol	1
Biochemical Oxygen Demand (BOD)	80
Chemical Oxygen Demand (COD)	81
Total	386

Of the 386 violations, 368 were violations of effluent limitations which had previously been violated. Two hundred sixty of those violations exceeded the applicable permit limitations by over 100 %. One hundred ninety-five of them, exceeded the permit limitations by more than 200 %. One hundred twenty-seven of them exceeded the applicable permit limitation by over 400 %. Eighty-six of them exceeded the permit limitations by 1,000 %.

Pursuant to the requirements of the Act, 33 U.S.C. § 1317(a), the EPA has published a list of toxic pollutants which includes phenol and methylene chloride. The EPA recently listed the 100 hazardous substances posing "the most significant potential threat to human health." 52 Fed. Reg. 12866 (April 17, 1987). The EPA's list is divided into four groups of 25 substances each in descending order of priority. Methylene chloride is priority group I and phenol is in priority group II. The defendant has

violated the effluent limitations in its permit for methylene chloride 9 times. The defendant has violated its effluent limitation for phenol once, but its permit has only contained that limitaiton since August 1987. Defendant has committed 10 violations of toxic pollutant limitaitons in its permit.

BOD and COD effluent limitations are designed to limit the amount of oxygen demanding material which is discharged into receiving waters. "BOD is a measure of the oxygen requirement exerted by micro-organisms to stabilize organic matter. Waste water entering [a body of water] exerts an oxygen demand thereby depleting the amount of oxygen available for use by fish and plants. Without adequate oxygen, fish and plants die, eventually choking [the body of water]." *United States v. Metropolitan District Commission*, 23 ERC 1350, 1353 n.4 (D. Mass. 1985). Defendant's discharge of BOD and COD is particularly harmful because of oxygen deficiencies in the Kill Van Kull and the connected water-ways in the New York Harbor complex. New Jersey's Department of Environmental Protection, Division of Water Resources, has noted these deficiencies in the New Jersey 1980 State Water Quality Inventory, Report to the Congress throught the Environmental Protection Agency, April 1980. That Report stated, at page 3, that "as in the past, the waters [of the Interstate Sanitary District] are plagued by . . . low levels of dissolved oxygen." The 1982 State Water Quality Inventory reported that "although [the Interstate Sanitation District Waters] show a general overall improvement since the last . . . inventory was compiled, District Waters are still plagued by low dissolved oxygen values during the summer months." The 1986 New Jersey Water Quality Inventory reported that "District Waters meet dissolved oxygen requirements during the winter; however, in some locations, dissolved oxygen values in the summer drop below standards for extended periods." Defendant's discharges added to the depletion of oxygen in the Kill Van Kull.

"TSS, or Total Suspended Solids, is an indication of the physical quality of the water. Very high levels of suspended solids can effect the ecology of [a body of water] by inhibiting light transmission needed for photosynthesis by which plants survive." *United States v. Metropolitan District Commission*, 23 ERC at

1553 n.4. The EPA has stated, and this Court recognizes that suspended solids can have an adverse affect on fish growth and reproduction and reduce the supply of food available to the fish. See *EPA, Quality Criteria for Water*, pp. 404-408 (1976). Defendant has violated the TSS limits of its permit 66 times.

As this Court has already noted, defendant's BOD and TSS effluent limitations are water based quality standards. See *SPIRG v. P.D. Oil*, 627 F. Supp. at 1088-1089. Water quality based effluent limitations are those which are designed to insure that water quality standards are met. Water quality standards, in turn, have been established to protect, restore, maintain and enhance a body of water so that it supports its designated uses and attains the fishable and swimmable goals of the Act. See 33 U.S.C. §§ 1311, 1312, and 1313; 40 C.F.R. 122.44(d). Any violations of these water quality based effluent limitations causes some degree of harm to the water quality of the Kill Van Kull.

Defendant has violated its permit with respect to oil and grease 48 times. New Jersey's 1980 State Water Quality Inventory stated at page 1 that "the waters [of the Interstate Sanitation District] are . . . high in oil and grease . . ." That Report also stated at page 2 that "the quality of the District's waters is continuously degraded by . . . large concentrations of both heavy metal and oil entering the waters from inadequately treated municipal and industrial wastes." The 1982 Water Quality Inventory stated that "District waters are still degraded by oil and grease. . . ." Defendant's discharges of oil and grease have added to the problems relating to these pollutants in the Kill Van Kull.

The EPA has determined that "a pH range of 6.5 to 9.0 appears to provide adequate protection for the life of fresh water fish and bottom dwelling invertebrate fish food organisms. Outside of this range, fish suffer adverse psychological effects with an increase in severity as the degree of deviation increases until lethal levels are reached." *EPA, Quality Criteria for Water*, p. 341. Defendant has violated the pH limits of its permit 63 times.

Since the installation of a water treatment system known as "Zimpro" in May 1987, the frequency of defendant's violations

has diminished substantially. However, the defendant has acknowledged violations of its permit since Zimpro's installation. Defendant offers no substantial evidence that it will not violate its permit in the future. Defendant's environmental consultant, LeRoy Sullivan, did not testify that defendant will not violate its permit in the future. Rather, he stated that defendant's waste water treatment plant is "adequate to meet the permit limits." Although the plant may be "adequate" to meet the permit limits if properly operated by defendant, Mr. Sullivan offered no testimony that the treatment plant, as actually operated by defendant, will meet the discharge limits contained in the permit in the future. Mr. Sullivan's testimony provides no basis for the Court to conclude that "the wrong will not be repeated". *Gwaltney of Smithfield Limited v. Chesapeake Bay Foundation*, 108 S.Ct. 376, 386 (1987).

Defendant's violations cause harm to the environment. This Court finds that based upon defendant's operations to this point, it is reasonable to conclude that its permit will be violated in the future.

Plaintiffs have attempted to convince the Court to penalize defendant for violating their permit from 1977 to 1987. Plaintiffs argue that whereas the technology to build a waste water treatment plant may not have been in existence in 1977, defendant had the option of hauling their waste water to an off-site treatment facility and thereby achieve compliance with their permit. The Court, however, is not convinced that facilities were available to treat defendant's waste water from 1977 until 1982. The Court finds that the defendant could have complied with its NPDES/NJPDES permit by hauling its waste water off-site from 1982 through April 1987, when it installed the Zimpro treatment plant and by hauling a portion of its waste water off-site from May 1987 through March 1988 in order to operate the facility in compliance with its permit. Defendant's environmental consultant, LeRoy Sullivan, testified that the DuPont Chamberworks facility in South Jersey was available to accept large quantities of waste water for treatment and disposal as early as 1982 or 1983. It has been stipulated by the parties by the

DuPont facility did not accept waste water for off-site treatment prior to 1982. Mr. Sullivan estimated that the cost of defendant's waste water off-site for treatment and disposal was approximately \$.11 or .12 per gallon in 1985 dollars. Defendant has no records of the amount of its flow to the Kill Van Kull for any period from September 1977 through June 1985. Based upon Mr. Sullivan's estimate, the Court determines that defendant's discharge from September 1977 through March 1988 was approximately 66 million gallons. Therefore, it is clear that the defendant enjoyed a considerable economic advantage by not hauling its waste water off-site for treatment and neglecting its permit limitations.

Using the standards contained in the Act, 33 U.S.C. § 1319(d), the Court will now make findings as to each of the factors to be considered in assessing a penalty. As has already been noted by this Court, § 1319(d), as amended, provides that

in determining the amount of a civil penalty the Court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good faith efforts to comply with the application requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

SERIOUSNESS OF DEFENDANT'S VIOLATIONS

The Court finds that defendant's 386 violations were very serious in nature. A significant number of the violations exceeded the permit limitations by large amounts. Significantly, some of the defendant's effluent was toxic to marine organisms because defendant's violations involved toxic pollutants and pollutants with the potential to cause environmental harm to the waters into which they were discharged. Moreover, the Court attaches significance to the large number of violations at issue.

THE ECONOMIC BENEFIT RESULTING FROM THE VIOLATIONS

It is patently clear to this Court that defendant benefited a great deal from its lack of compliance with the permit. It is

difficult to quantify the precise amount of benefit that the defendant incurred as a result of its noncompliance. Plaintiffs submit various methods by which this Court should compute the benefit. However, all of these methods result in amounts far in excess of the statutory maximum in this case. Therefore, those computations are of little help in guiding the Court as to what penalty should be imposed. Needless to say, those numbers compel this Court to gravitate towards the higher end of the penalty range, if not the maximum.

DEFENDANT'S HISTORY OF VIOLATIONS

The Court finds that defendant's 386 violations spanned an 11 year period from 1977 to 1988. Defendant has violated its permit in each of those 11 years.

DEFENDANT'S "GOOD FAITH" EFFORTS TO COMPLY WITH ITS PERMIT

It is perhaps under this section of the statute that the parties most differ. Plaintiffs attempt to portray the defendant as an egregious violator who, throughout the entire period at issue made no attempts whatsoever to comply with its permit and flagrantly violated both Orders of this Court and EPA decrees. On the other hand, the defendant asserts that it has made good faith efforts to comply all along and that it was lulled into complacency by both the New Jersey Department of Environmental Protection and United States Environmental Protection Agency.

This case is a tragedy in many respects. It demonstrates that private industry, left to its own initiative, will procrastinate indefinitely, even at the expense of the environment, any efforts to remedy an obviously poor situation. It further demonstrates that the government agencies empowered with protecting the environment are far from diligent in that regard. In July 1985 defendant's corporate secretary, Ronald Sprague, summarized defendant's attitude towards achieving compliance as follows:

We have consistently been unable to meet our permit limitations through any means and have been unwilling

to commit to treatment schemes. Improved house-keeping, vast amounts of concrete and asphalt to prevent ground water intrusion, capturing all available rain water to dilute our contaminated run-off — all these schemes have not improved our water qualify.

As a result of years of non-compliance, even though environmental enforcement agencies have appeared complacent, we now face a much different climate. We are being sued by PRIG, an environmental bounty hunting group. This action has forced DEP to change its complacing [sic] and impose a consent order upon PD, the bottom line of which is that by May 31, 1986, PD must have *completed* pilot work and design work to the point of submitting an application for Treatment Works approval. This application must show that our proposed Treatment Works will enable our out-fall to *fully* comply, on a routine basis, with *all* limitations of our permit. [Emphasis in original].

Defendant, at times with the tacit approval of the EPA, was content to go on polluting the Kill Van Kull indefinitely. The pace at which the EPA was requiring defendant to proceed with the treatment facility was minimal at best. It was not until PIRG came on to the scene that the EPA started meaningfully enforcing its permits and required defendant to actually build some sort of waste water facility.

Looking at this from a realistic perspective, it is hard to penalize defendant the maximum penalty for its lack of good faith in this regard. Companies generally operate with economic benefits as a goal. Clearly it was less expensive to procrastinate and build temporary stop-gap measures to try and comply with the permit than to build a waste water facility sooner than was absolutely necessary. This Court does not condone defendant's behavior. Companies must be mindful of the environment and take measures to bring themselves into full compliance with all

outstanding permits. However, fault also lies with the EPA and with the New Jersey DEP. Throughout defendant's term of non-compliance, these environmental agencies were aware of defendant's activities and took no affirmative measures other than an occasional threatening letter to bring defendant into compliance. A brief recitation of defendant's history is in order.

Defendant's parent corporation, Powell Duffryn, USA, Ltd., purchased all of the issued and outstanding stock of the El Dorado Terminals Corporation on July 22, 1977. At that stock purchase Powell Duffryn, USA, Ltd. was informed that it was purchasing the stock of a corporation which was subject to an enforcement action by the United States government for its failure to comply with the terms and conditions of its NPDES permit. The sale agreement specifically provided that:

Except as specified in Exhibit F hereto, there are no claims, actions, suits, or proceedings pending or, to the knowledge of Sellers, threatened against or affecting the Sellers, the company ... or any of their respective properties and assets, at law or in equity, or before any arbitrator, or before or by any governmental department, agency or other instrumentality of any kind, domestic or foreign, which may result in any materially adverse change in the business, operations, properties or assets of the Company or in the condition, financial or otherwise, of the Company

....

Exhibit F lists the enforcement action by the United States against the defendant as follows:

Current status of *United States of America v. El Dorado Terminals Corporation*, Civil Action No. 77-228 in the United States District Court for the District of New Jersey, including, without limitation, status of Order on Consent of Environmental Protection Agency *In the Matter of El Dorado*

Terminals Corporation, NPDES Permit No. New Jersey 0003361.¹

Throughout the next several years, defendant received mixed reviews from the EPA and the NJDEP. At times defendant was informed that it was acting "good faith" by attempting to contain its discharges to within the permit perimeters. *See* Letters of August 16, 1977 and October 25, 1977 from Steven Rubin, Environmental Engineer, Water Facilities Branch of the EPA, to the defendant (permittee (defendant) has demonstrated a good faith attempt to comply with the permit); NPDES Compliance Inspection Report dated March 15, 1983 from Larry Parker, of the EPA ("I conducted an inspection of the above subject facility on March 11, 1983. The inspection revealed that the permittee has complied in good faith regarding contaminated storm run-off discharge, by constructing dikes and paving areas to confine possible contaminated run-off.").

At other times, the EPA wrote to defendant stating that defendant's discharging monitoring reports ("DMR") indicate that the discharge may not comply with certain effluent limitations contained in the permits. *See, e.g.*, Letters dated November 7, 1980 and September 1, 1981 from the Water Enforcement Branch of the EPA to the defendant. Additionally, on November 2, 1981 the Water Enforcement Branch of the EPA wrote to the defendant stating:

Your DMR for the reporting period ending August 31, 1981 indicates that the discharge again does not comply with certain of the limitations specified in your permit A review of past DMRs reveals a serious and persistent pattern of violations. It is necessary that

¹ Civil Action 77-228 was resolved by the entry of a Consent Judgment as an Order of this Court on April 14, 1977. In the Consent Judgment, defendant admitted that it had violated its NPDES permit and that it had "failed to construct an appropriate treatment facility for its pollutant discharge in violation of the said NPDES permit . . .". That Consent Judgment ordered defendant to pay a civil penalty of \$10,000.00 for the violations of the Clean Water Act alleged in the Complaint.

the corrective measures you are taking be sufficient to ensure future compliance.

These inconsistent reports continued until roughly 1984 when plaintiffs filed suit in this Court alleging that "the defendant has violated and continues to violate §§ 301 and 402 of the Federal Water Pollution Control Act by failing to comply with the effluent limitations in its . . . permit." On April 5, 1984 a joint EPA and NJDEP inspection of defendant's facility was conducted which concluded that the defendant was still in violation of its effluent permit. In September 1984 the NJDEP issued an Administrative Consent Order which alleged that defendant "has violated the conditions of [its permit] . . . in that it has . . . failed to comply with the final effluent limitations required by . . . said permit." The Administrative Consent Order required defendant to submit a plan and schedule for "design and operation" of a waste water treatment facility and to comply with all terms and conditions of [its permit]." In late 1985, only after substantial pressure was brought to bear on the defendant as a result of plaintiffs' actions, defendant submitted to NJDEP a Treatment Works Approval Report seeking approval to move forward with the Zimpro water treatment facility. A Treatment Works Approval Permit is required under New Jersey law pursuant to N.J.S.A. 58:10A-1, *et seq.*, and N.J.A.C. 7:14A-12.1, *et seq.*, before construction and/or operation of a waste water treatment facility can begin. Throughout 1986, although still not in compliance with its permit, defendant made headway in constructing the Zimpro plant. The Zimpro system was installed and began operations on May 1, 1987. Since the installation of Zimpro the amount of defendant's violations has been reduced significantly.

In conclusion, this Court cannot say that defendant's actions rose to the level of "good faith". It is clear to this Court that defendant, motivated possibly by greed or apathy, chose to procrastinate. What makes this particularly distressing is that defendant's actions were done, for the most part, with the EPA's approval. That fact alone weighs in favor of not imposing on the defendant the maximum statutory penalty.

ECONOMIC IMPACT OF THE PENALTY ON THE VIOLATOR

While it is not binding on the Court, the EPA's 1986 penalty policy provides that the defendant has the principle burden of establishing that the penalty should be reduced because of the economic impact. Defendant has failed to demonstrate that assessing a severe penalty would jeopardize defendant's continued operation. *See Chesapeake Bay Foundation v. Gwaltney*, 611 F. Supp. 1542, 1562 (E.D. Va. 1985) (the Court was "unpersuaded that any penalty warranted by *Gwaltney's* violations would jeopardize *Gwaltney's* continued operation"), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *vacated and remanded on other grounds*, 108 S.Ct. 376 (1987).

Defendant claims that it is in a relatively poor economic position. The Court is not persuaded that this is the case. Defendant is a wholly owned subsidiary of Powell Duffryn, U.S.A., Ltd., a holding corporation organized under the laws of the State of Delaware. Powell Duffryn, U.S.A. Ltd. is owned by Powell Duffryn International. Powell Duffryn International is owned by Powell Duffryn p.l.c., a British corporation which is publicly traded on the London Stock Exchange. During the past 11 years, defendant has expanded the size of its facility to more than double its original size by building a westside expansion and an eastside expansion which is a joint venture with the Dow Chemical Company. In 1985, defendant started an anti-freeze packaging division at its Bayonne, New Jersey facility and at its Lemont, Illinois facility. Defendant also operates two wholly-owned subsidiaries providing bulk terminal storage facilities in Savannah, Georgia and Lemont, Illinois.

CONCLUSIONS OF LAW

In applying the statutory penalty factors set forth in the act, the Court has considered the civil penalty policy developed by EPA. This Court has recently noted that "although the EPA penalty policy does not have the force of law, it is consistent with the Congressional policy behind the Act". *SPIRG v. Hercules, Inc.*, 29 ERC 1417, 1418 (D.N.J. 1989). The Court also noted that "the 1987 amendments, while not incorporating the

language and detail expressed in the EPA penalty policy, serve as a reasonable summary of that policy." *Id.*

Civil penalties seek to deter pollution by discouraging future violations. *Spirg v. Hercules*, 29 ERC at 1423; *SPIRG v. A.T. & T. Bell Laboratories, Inc.*, 617 F. Supp. 1190, 1201 (D.N.J. 1985). To serve this function, the amount of the civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business. Otherwise, a rational profit maximizing company will choose to pay the penalty rather than incur compliance costs. See *EPA, Policy on Civil Penalties*, (February 16, 1984) at p. 3. Additionally the probability that a penalty will be imposed must be high enough so that polluters will not choose to accept the risk that non-compliance with go unpunished. *Id.*

The Court is satisfied that the defendant enjoyed significant economic benefit from its failure to bring itself into compliance with its permit sooner than 1988. Based upon this Court's factual findings, that economic benefit is in excess of the statutory maximum penalty of \$4,205,000.00. Regrettably, were this Court to assess the statutory maximum, defendant would still have benefited from its non-compliance. Defendant's violations are serious in nature. The seriousness of these violations would also lead this Court to impose the statutory maximum on the defendant. Moreover, the defendant has not demonstrated to the satisfaction of this Court that a severe economic penalty would jeopardize its continued operation. Therefore, defendant's economic status has no bearing on the imposition of penalties. Defendant has also had a long history of violations which would also lead this Court to impose the statutory maximum.

With regard to defendant's "good faith" attempts to comply with the Act, the Court will adjust the statutory maximum downwards by \$1,000,000.00 because of the actions and/or non-actions taken on behalf of the United States Environmental Protection Agency and the New Jersey Department of Environmental Protection. The Court finds that had they acted more diligently in making defendant comply, the violations in this case would have ceased long ago. Therefore, those two governmental bodies are partially to blame for the defendant's lack of compliance for the years at issue.

The Court explicitly rejects defendant's contention that no penalty should be assessed against it because there has been no adverse impact on the Kill Van Kull as a result of the permit violations. Congress has stated that the objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). The EPA has recognized that "all pollutants introduced into the environment create some harm or risk, of course, and it will be difficult in many cases to precisely quantify the harm or risk caused by the violation in question." EPA, *Civil Penalty Policy* (July 18, 1980) p. 10. In *SPiRG v. Hercules*, defendant argued for a low penalty based on the lack of measurable harm from its violations. In responding to that argument the Court stated

The Congressional declaration of goals and policy set forth in 33 U.S.C. § 1251 seeks the restoration and maintenance of the chemical, physical and biological integrity of the nation's water. *Hercules' violations have produced at least a potentially destructive impact on the waterways in its area. Therefore, the Court does not agree with Hercules* that a relatively low penalty factor should be assigned to this aspect of its violations.

Similarly, in *PIRG v. C.P. Chemicals*, 28 ERC. 2017, 2021 (D.N.J. 1987), the Court concluded "if the Court were to adopt defendant's view, . . . any permittee could ignore the requirements of its permit with impunity so long as it discharged into already heavily polluted waters. Clearly, any argument that toxic discharges fail to make the receiving water measurably worse frustrates the Act's intent to improve the quality of our nation's waters." The parties have stipulated, and the Court recognizes that the Kill Van Kull is one of the most industrialized waterways in the Eastern United States. Therefore, even if defendant's discharge did not measurably damage the Kill Van Kull, the fact that defendant violated its permit by discharging more pollutants than authorized means that the restoration and enhancement of the river's water quality was inhibited and therefore, the objective of the Act was frustrated.

The Court must determine whether or not a permanent injunction prohibiting defendant from violating its permit should issue. In *SPIRG v. Monsanto Company*, Judge Van Artsdalen was faced with a similar situation. Plaintiff sought injunctive relief enjoining defendant from violating its permit. Defendant contended that injunctive relief was not warranted because there were no violations since May of 1986. *SPIRG v. Monsanto Company*, 83-2040, Slip Op. at 35 (D.N.J. March 24, 1988). The Court enjoined defendant until April 30, 1990, roughly one year from the date of the Order from violating its permit. The Court reasoned that:

[S]o long as Monsanto continues in full compliance with the permit, the added compulsion of an injunction will cause no harm to Monsanto. Conversely, if there are any future violations and no injunction is presently issued, before any sanction, penalty or abatement could be ordered, another EPA order enforcement action or citizen suit enforcement action would have to be instituted with its consequent expense and delay.

Id. at 36. The Court continued that

especially in light of my serious doubt that in a citizen suit any penalty can be imposed for pre-complaint violations, plus the *Gwaltney* requirement of good faith allegations of on-going violations . . . a later legal action, should there be violations, would appear at best to provide inefficient and inadequate remedies, when compared to entering an injunction in this case."

Id. at 36-37. This Court fully adopts the rationale of the *Monsanto* court in enjoining defendants.

By Order dated October 28, 1988, this Court denied plaintiff's request for a preliminary injunction. In doing so, I noted that plaintiff had failed to demonstrate the imminence of irreparable harm absent the issuance of an injunction. *PIRG v. P.D. Oil*, No. 84-340, Slip Op. at 14 (D.N.J. October 28, 1988).

The Court relied in part on the fact that defendant had submitted DMRs which demonstrated that it was in compliance with its permit from May through July 1988. Since that time, the defendant has violated its permit at least once. Therefore, the Court can no longer be satisfied that the defendant will comply with its permit absent the issuance of an injunction. It is well established that the grant or denial of a request for a preliminary injunction is not binding on the issue of a permanent injunction following a trial. See *E.P.G. University of Texas v. Camenisch*, 451 U.S. 390, 394 (1981).

In response to the application for an injunction, the defendant argues that since the installation of Zimpro any violations of the permit have been "one time mistakes" and were caused without fault on its part. This argument must fail. As the Court noted in *SPRIG v. Monsanto*,

An NPDES permit requires full compliance. It imposes liability without fault. Fault may be a proper consideration in determining what, if any, penalty to impose but lack of fault does not exempt the discharger from complying with its permit.

Id. at 35.

The standards for issuance of a permanent injunction are:

- (1) Actual success on the merits;
- (2) Irreparable harm to the moving party;
- (3) Harm to other interested persons, including the non-moving party; and
- (4) The public interest.

Amaco Production Company v. Village of Gambell, 107 S.Ct. 1396, 1404 n.12 (1987).

Plaintiffs have clearly met this standard. They have demonstrated actual success on the merits; they have

demonstrated irreparable harm to themselves and the public by having defendant discharge pollutants into the waters of the Kill Van Kull, absent the issuance of an injunction. The third factor, harm to other interested persons, including the non-moving party, clearly weighs in favor of granting the permanent injunction. If defendant is in compliance of its permit, it will suffer no injury. There is no additional burden placed on defendant. Lastly, the public interest clearly mandates in favor of a permanent injunction. Defendant was given the opportunity during the course of these proceedings to comply with its permit absent the issuance of a preliminary injunction. Defendant has failed to do so. Therefore, this Court will enjoin defendant from violating the terms and conditions set forth in its NPDES permit.

Lastly, the question remains as to how the Court should disperse the penalty. Merely having these monies paid to the Federal Treasury does not, in this Court's judgment, satisfy the purposes of the Act, nor completely discharge this Court's duty in environmental cases. This Court has an affirmative obligation to direct those funds to ameliorate environmental pollution. Paid into the public coffers, the penalties lose their identity and indeed, in all likelihood, will be used for other purposes. By retaining jurisdiction over the disbursement of these penalties, this Court can be assured that the actions taken by plaintiff (a public action group) to protect the environment will be vindicated and the fruits of its labor properly reinvested in the environment. Consistent with the remedial purpose of the Act and the above outlined goals, the Court will appoint three Trustees for the fund to investigate and recommend to this Court how these funds should be used to directly impact environmental problems in New Jersey.

The foregoing constitutes my findings of fact and conclusions of law.

An appropriate Order accompanies this Opinion.

/s/ Nicholas H. Politan

NICHOLAS H. POLITAN
U.S.D.J.

Dated: September 19, 1989

The first of these is the fact that the population of the United States has increased from 100,000,000 in 1900 to 150,000,000 in 1927. This increase has been accompanied by a corresponding increase in the number of automobiles, from 1,000,000 in 1900 to 15,000,000 in 1927. The second fact is that the number of automobiles per capita has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The third fact is that the number of automobiles per family has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The fourth fact is that the number of automobiles per city has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The fifth fact is that the number of automobiles per country has increased from 1 in 100 in 1900 to 1 in 10 in 1927.

The sixth fact is that the number of automobiles per family has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The seventh fact is that the number of automobiles per city has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The eighth fact is that the number of automobiles per country has increased from 1 in 100 in 1900 to 1 in 10 in 1927.

The ninth fact is that the number of automobiles per family has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The tenth fact is that the number of automobiles per city has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The eleventh fact is that the number of automobiles per country has increased from 1 in 100 in 1900 to 1 in 10 in 1927.

The twelfth fact is that the number of automobiles per family has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The thirteenth fact is that the number of automobiles per city has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The fourteenth fact is that the number of automobiles per country has increased from 1 in 100 in 1900 to 1 in 10 in 1927.

The fifteenth fact is that the number of automobiles per family has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The sixteenth fact is that the number of automobiles per city has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The seventeenth fact is that the number of automobiles per country has increased from 1 in 100 in 1900 to 1 in 10 in 1927.

The eighteenth fact is that the number of automobiles per family has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The nineteenth fact is that the number of automobiles per city has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The twentieth fact is that the number of automobiles per country has increased from 1 in 100 in 1900 to 1 in 10 in 1927.

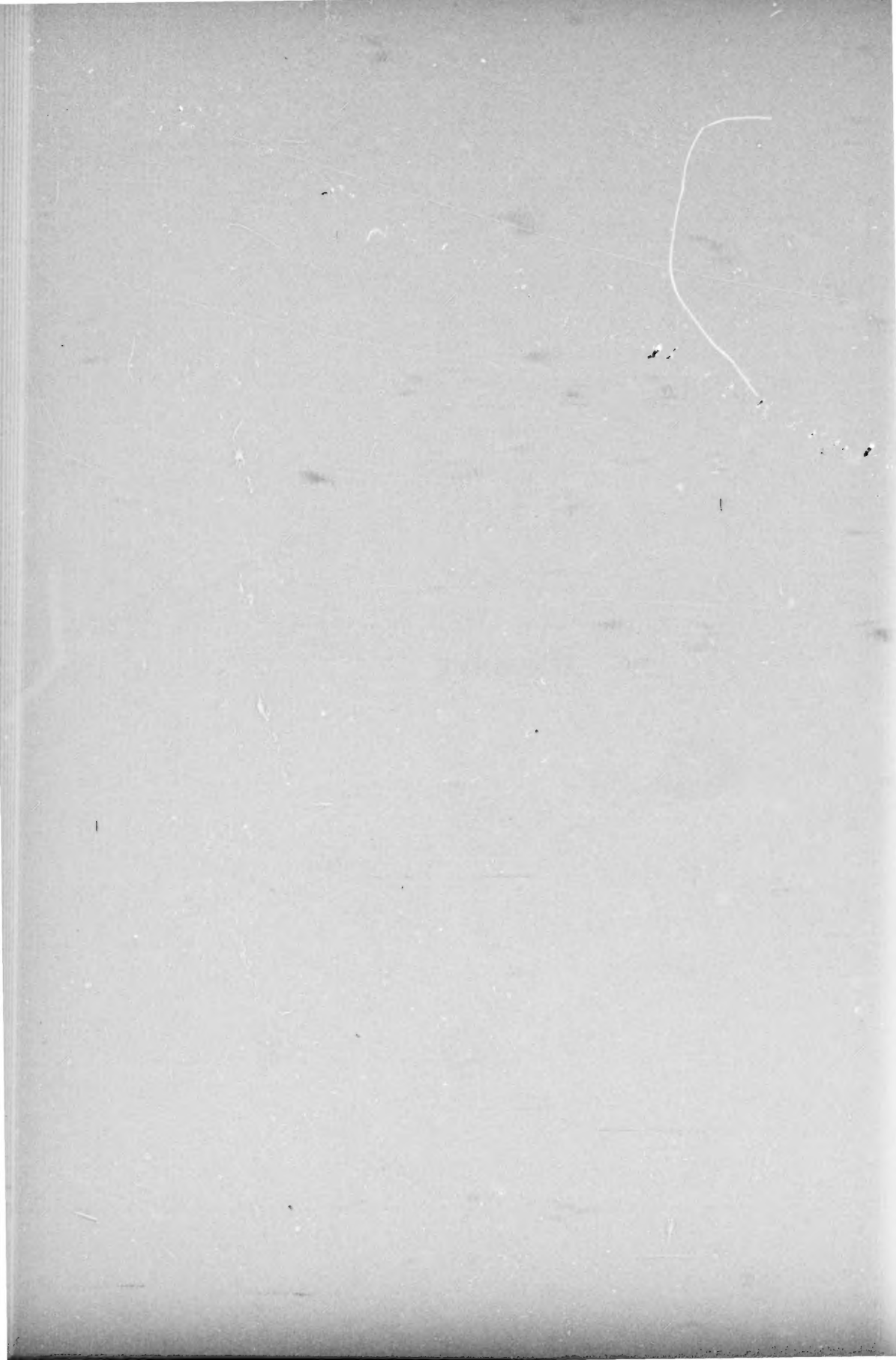
The twenty-first fact is that the number of automobiles per family has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The twenty-second fact is that the number of automobiles per city has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The twenty-third fact is that the number of automobiles per country has increased from 1 in 100 in 1900 to 1 in 10 in 1927.

The twenty-fourth fact is that the number of automobiles per family has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The twenty-fifth fact is that the number of automobiles per city has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The twenty-sixth fact is that the number of automobiles per country has increased from 1 in 100 in 1900 to 1 in 10 in 1927.

The twenty-seventh fact is that the number of automobiles per family has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The twenty-eighth fact is that the number of automobiles per city has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The twenty-ninth fact is that the number of automobiles per country has increased from 1 in 100 in 1900 to 1 in 10 in 1927.

The thirtieth fact is that the number of automobiles per family has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The thirty-first fact is that the number of automobiles per city has increased from 1 in 100 in 1900 to 1 in 10 in 1927. The thirty-second fact is that the number of automobiles per country has increased from 1 in 100 in 1900 to 1 in 10 in 1927.

APPENDIX C



APPENDIX C
ORDER AND OPINION OF DISTRICT COURT
September 19, 1989

VOLUME 1
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO. 84-340

PUBLIC INTEREST RESEARCH	:	
GROUP OF NEW JERSEY, INC., et al.,	:	TRANSCRIPT OF
<i>Plaintiffs,</i>	:	PROCEEDINGS
	:	
— vs —	:	
	:	
P.D. OIL & CHEMICAL STORAGE, INC.,	:	TRIAL
<i>Defendant.</i>	:	TRANSCRIPT

Newark, New Jersey
May 4, 1989

B E F O R E:

THE HONORABLE NICHOLAS H. POLITAN, U.S.D.J.

A p p e a r a n c e s:

EDWARD LLOYD, ESQ.,

and

TERRIS, EDGECOMBE, HECKER & WAYNE, ESQS.,

BY: BRUCE J. TERRIS, ESQ.,

CAROLYN SMITH PRAVLIK, ESQ., and

KATHLEEN L. MILLIAN, ESQ.,

For the Plaintiffs.

RIDOLFI, FRIEDMAN, FRANK, EDELSTEIN &
BERNSTEIN, ESQS.,

BY: NATHAN M. EDELSTEIN, ESQ., and

GARY BACKINOFF, ESQ.,

For the Defendant.

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

STANLEY B. RIZMAN, C.S.R.,
Official Court Reporter

* * *

[The Court] Now we have plaintiffs' motion to amend the Court's order of March 13th, 1987. The summary judgment with reference to 190 additional violations.

Plaintiff has moved for summary judgment alleging 190 additional violations of the permit have occurred and they are entitled to judgment as a matter of law on those violations. Currently, summary judgment has already been granted on 200 violations by Judge Ackerman. In support of this motion, plaintiff relies on defendant's laboratory reports.

The case law within the District of New Jersey establishes that records which are required to be kept by law, such as DMRs, constitute admissions sufficient to establish defendant's civil liability. See SPIRG versus Hercules, 23 E.R.C. Reporters 2081, District of New Jersey 1986.

Summary judgment on the issue of liability for violations of the Act is appropriate because the Clean Water Act imposes strict liability for violations of its provisions. SPIRG versus Georgia Pacific Corporation, 615 F. Supp. 419, District of New Jersey 1985.

Moreover, documents other than DMRs on which defendant records its monitoring data can also be used to establish liability. Defendant is required by its permit and by the EPA and the NJDEP regulations to retain its monitoring reports and to report all instances of permit noncompliance.

Consequently, any document containing information concerning permit noncompliance is a required official report even though it may not have been filed with the EPA and the NJDEP as a DMR.

This Court has granted summary judgment as to violations based on monitoring records. See SPIRG versus AT&T Bell Laboratories, 617 F. Supp. 1090, District of New Jersey 1985.

Defendant argues that plaintiffs' motion for summary judgment should be denied on numerous grounds. First, they assert that the plaintiffs' motion is untimely. The Court is satisfied however, that plaintiffs' motion is timely.

Pursuant to a scheduling order, all dispositive motions had to be filed on or before December 27, 1988. This motion was filed on December 27th, 1988 and, therefore, it is timely.

Next, defendants argue that this Court has already denied motions on 128 of these alleged 190 violations. Defendant interprets this Court's refusal to allow plaintiff to amend the Complaint in this action to allege monitoring violations to encompass the discharge violations currently at issue. The instant motion however, concerns discharge violations, not monitoring violations. While some of these discharge violations may also give rise to reporting violations, that does not immunize defendants from liability.

Defendant also asserts that some of the decimal points contained within the lab reports are in error. Defendant argues that a single laboratory value for TSS of 290 mg/l, which was measured on February 1st, 1983, is a typographical error relating to the placement of the decimal point and that the true measure on that date is 29 mg/l. Courts however, have repeatedly held that a discharger cannot avoid its liability for violations by claiming laboratory error, at least in the absence of a specific and convincing evidence. *SPIRG versus AT&T supra*, *SPIRG versus Hercules supra*.

In the instant case, defendant has not submitted convincing evidence to demonstrate that the lab reports were in error.

Defendant raises numerous other objections to summary judgments, including that plaintiff has double counted some of the violations and that plaintiff has inappropriately averaged some of the violations. The Court has carefully reviewed all of the evidence submitted and finds defendant's arguments totally unpersuasive.

As has been noted by this Court before, in order to prevail on a motion for summary judgment, plaintiff need only to demonstrate the absence of any disputed material fact and that the facts demonstrate the probability of violations. See SPIRG versus AT&T.

Plaintiff has come forward with sufficient evidence to demonstrate that probability of violations. Defendant's proffers are insufficient to raise a material issue of fact with regard to the credibility of the records at issue. Moreover, defendants attempt to discredit the report by asserting that a plaintiff's counsel's paralegal is not qualified to interpret them is sheer nonsense. The reports speak for themselves. One need only look at the reports to ascertain whether certain parameters were exceeded. The Court is satisfied that the reports are fully credible and that the lab reports submitted conform the basis for summary judgment.

For the reasons outlined herein, this Court will grant plaintiff's motion to amend the Court's order of March 13th, 1987 to include summary judgment as to defendant's liability for the additional 190 violations.

Next, on the appeal of Judge Hedges' order, I'm satisfied that there has been a waiver of the privilege. There was not a reasonable precaution taken in connection with that. There was a long delay. Perhaps someone should have been more diligent in finding this out. I'm satisfied there is a waiver. I will, therefore, permit plaintiff to utilize the documents which Judge Hedges refused to permit use in this case. I am, therefore, reversing Judge Hedges ruling.

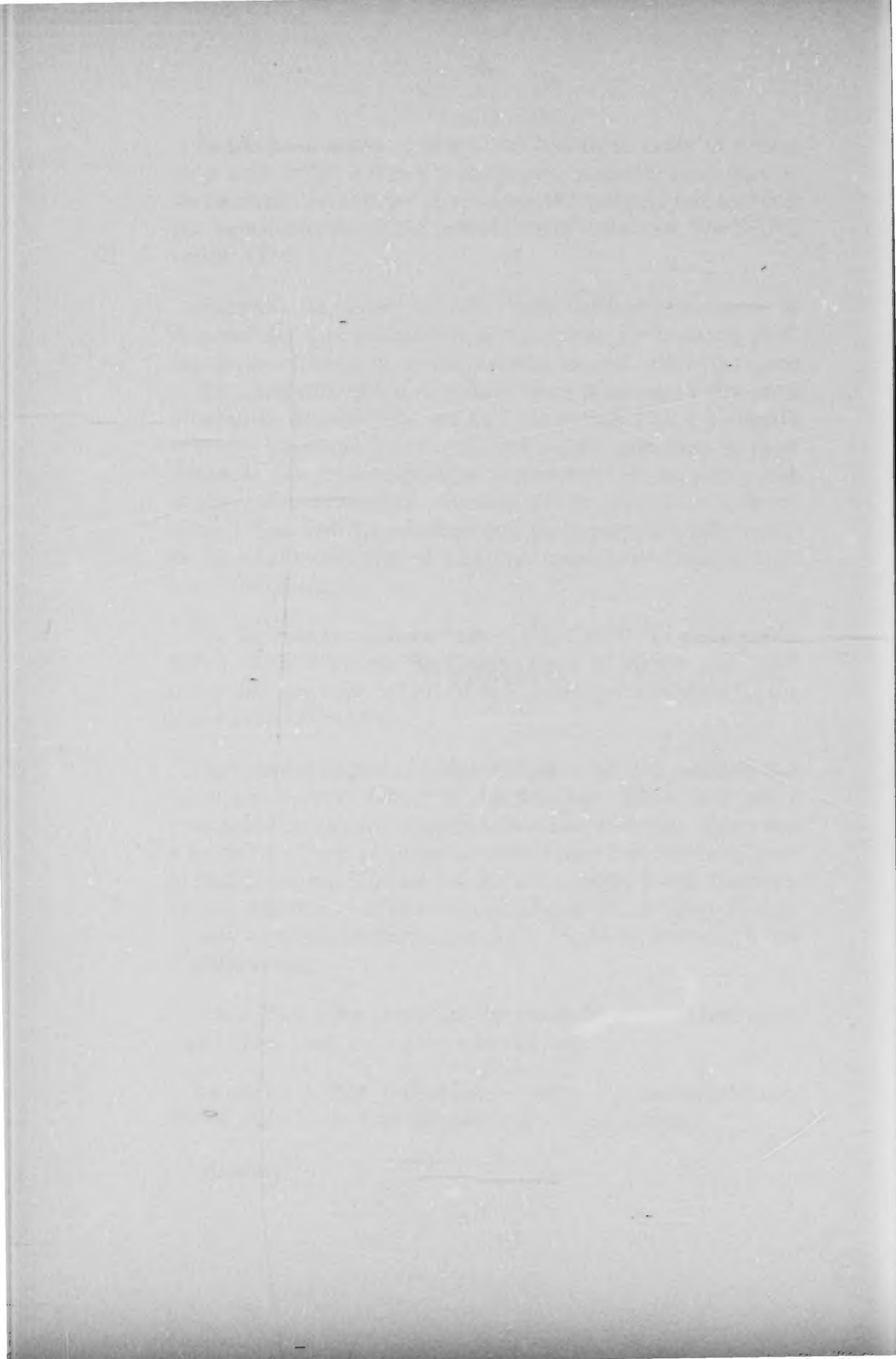
Okay. That takes care of all the pretrial matters. Gentlemen and ladies. Now we'll get on to the case.

Before we do that, I must have a matter of personal privilege. I'll be right back. Get yourself ready for openings.

(Recess.)

• • •

APPENDIX D



APPENDIX D
DISTRICT COURT ORDER
March 13, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 84-340

STUDENT PUBLIC INTEREST	:	
RESEARCH GROUP OF NEW JERSEY,	:	
et al.	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
P.D. OIL & CHEMICAL STORAGE,	:	ORDER
INC.,	:	
	:	
Defendant.	:	

For reasons stated in the Court's Opinion in this matter filed January 15, 1987, and as a result of plaintiff's filing on February 3, 1987 the affidavit of Loc P. Nguyen dated January 28, 1987;

It is on this 13th day of March, 1987;

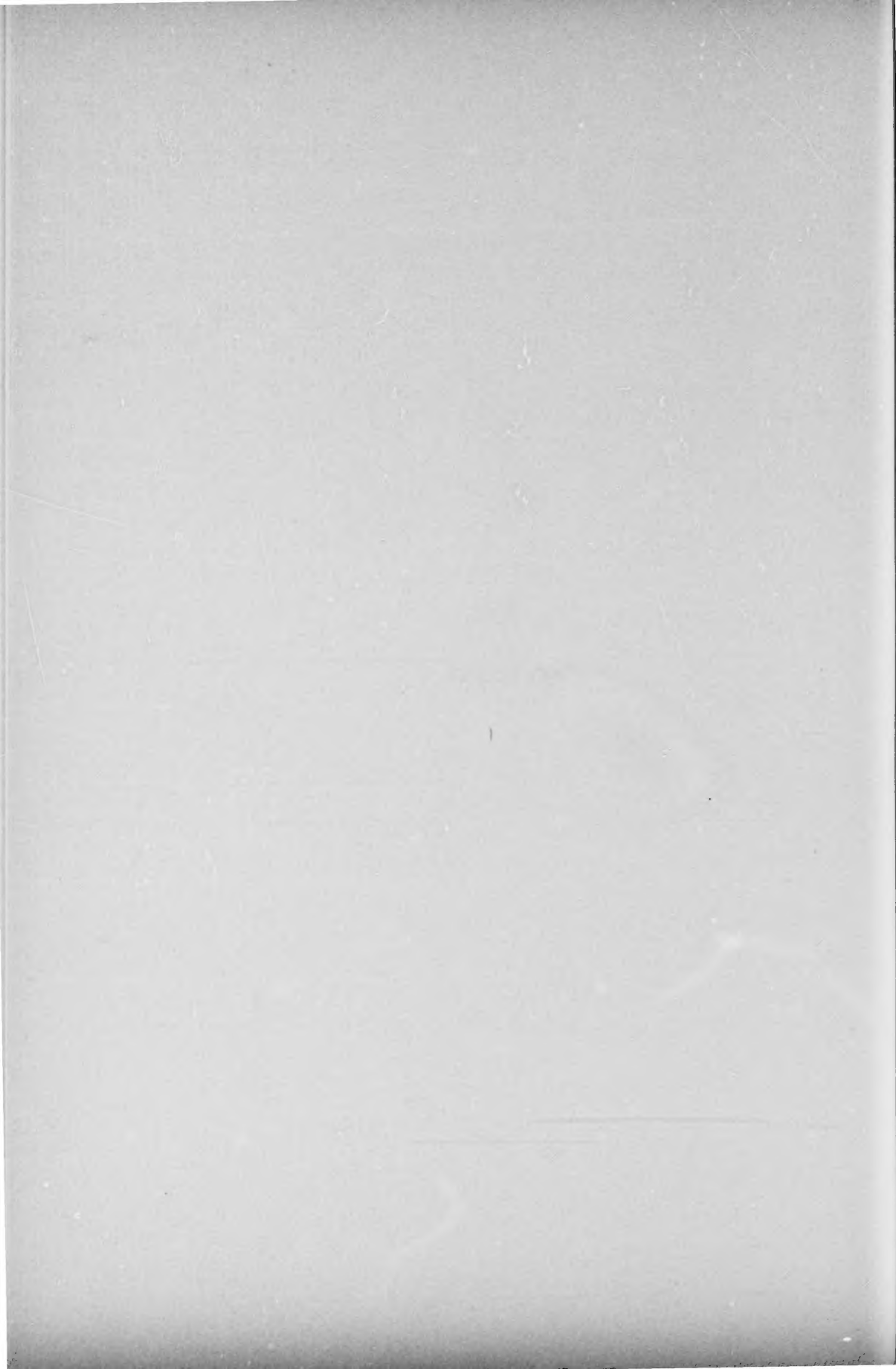
ORDERED that the Order of this Court entered on January 13, 1986, be, and hereby is, amended so that the Appendix attached to that Order is deleted and the Revised Exhibit K submitted to the Court on September 9, 1985 is substituted in its place.

/s/ Harold A. Ackerman

HAROLD A. ACKERMAN
U.S.D.J.



APPENDIX E



APPENDIX E

ORDER & OPINION
DISTRICT COURT

DATED JANUARY 15, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

STUDENT PUBLIC INTEREST	:	
RESEARCH GROUP OF N.J.,	:	
Inc., et al.,	:	CIVIL ACTION
	:	No. 84-340
Plaintiffs,	:	
	:	
v.	:	ORDER
P.D. OIL & CHEMICAL STORAGE,	:	
INC.,	:	
	:	
Defendant.	:	

For the reasons set forth in this court's opinion filed this date;

It is on this 5th day of January, 1987;

ORDERED that defendant's motion for reargument and defendant's motion for § 1292(b) certification are hereby denied; and

It is FURTHER ORDERED that the court's order of January 13, 1986 shall be amended upon plaintiffs submission of the appropriate supporting papers.

/s/Harold A. Ackerman

HAROLD A. ACKERMAN
U.S.D.J.

ENTERED on THE DOCKET
on January 15, 1987
WILLIAM WALSH, CLERK
By /s/E. McKenna, Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

STUDENT PUBLIC INTEREST	:	
RESEARCH GROUP OF N.J.,	:	
Inc., et al.,	:	CIVIL ACTION
	:	No. 84-340
Plaintiffs,	:	
	:	
v.	:	OPINION
P.D. OIL & CHEMICAL STORAGE,	:	
INC.,	:	
	:	
Defendant.	:	

APPEARANCES:

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Attorneys for Defendants

ACKERMAN, District Judge.

This is an action brought by two environmental conservation groups, the Student Public Interest Research Group of New Jersey (SPIRG) and Friends of the Earth, against P.D. Oil and Chemical Storage, Inc. as a citizen suit under the Federal Water Pollution Control Act of 1972 (FWPCA), 33 U.S.C. §§ 1251 et seq. (1982).

On January 13, 1986, I issued an opinion and order granting plaintiff's motion for summary judgment against defendants on the issue of FWPCA liability. Specifically, I held defendant liable for 154 violations of FWPCA, up to and including violations reported by defendant in its June 1, 1984 Discharge Monitoring Report (DMR). I did not grant summary judgment on any issues of remedy. At this point in the case, these issues remain undecided.

The parties have now brought three issues between them relating to my January 13, 1986 opinion and order. First, defendant has moved for reargument of an issue decided in my January 13, opinion: whether defendant's DMRs constitute admissions of FWPCA violations. Second, defendant has moved under 28 U.S.C. § 1292(b) (1982) for certification of certain interlocutory issues so that they may be appealed immediately to the Third Circuit. Third, plaintiffs have moved to amend my January 13 opinion and order so that they cover an additional number of alleged FWPCA violations. I shall consider each motion in turn.

Rule 12I of the General Rules of the United States District Court for the District of New Jersey provides for reargument of an issue already decided by the court when counsel alert the court to matters or controlling decisions previously overlooked. See F.R.Civ.P. 60(b).

In my January 13 opinion, I found that defendant's DMRs amounted to admissions that defendant had exceeded the effluent discharge standards imposed upon it by the FWPCA, and had therefore violated the FWPCA. Opinion of January 13,

1986, at 37. Defendant moves for reargument on the issue whether defendant's DMRs constituted admissions for summary judgment purposes. Specifically, defendant has requested reargument on:

The relevancy of the 'time averaged standards' in determining whether or not there were excess discharges and therefore violations of the permit, and whether same gives rise to a factual dispute requiring denial of plaintiffs' motion for summary judgment.

Brief in Support of Defendant's Motion for Re-Argument, at 2.

Defendant has cited no controlling decisions which it believes the court has overlooked. Defendant has stated what it believes are factual matters which the court has overlooked. First, defendant contends that it is "scientifically impossible" for it to report time-averaged measurements of biological or biochemical oxygen demand (BOD) or total suspended solids (TSS) as required by defendant's DMRs. Defendant's Brief at 3.

Presumably, defendant believes that this allegation supports reconsideration of my findings that the DMRs constitute admissions of prohibited BOD and TSS levels, among other violations. I disagree. Challenges by permittees to discharge limitations imposed by the EPA must be made by separate appeals, and cannot be made in a civil proceeding for enforcement of the limitations. 33 U.S.C. § 1369(b)(1) and (2)(1982). Thus, defendant's allegation is irrelevant to this case. Second, defendant contends that the figures reported on its DMRs as time-averaged BOD and TSS measurements were not, in fact, time-averaged figures, but instead represented measurements made at intermittent moments and not averaged over time. Defendant's discharge permit states, however, that measurements taken for the purpose of monitoring "shall be representative of the monitored activity." See Exhibit D to Plaintiffs' Brief in Support of Their Motion for Partial Summary Judgment, at Part II, page 16, paragraph 10.a. Thus, the entries on defendant's DMRs are properly deemed representative of defendant's discharge activity. In addition, I note, as I did at pages 36-37 of my January 13 opinion, that courts interpreting FWPCA:

... have been very reluctant to limit the legal effect of permit violations revealed in DMRs. For instance, defendants may not avoid summary judgment as to liability under the Act simply by challenging the accuracy of the data set forth in DMRs.

SPIRG v. Georgia-Pacific Corp., 615 F.Supp. 1419, 1430 (D.N.J. 1985) (citing *SPIRG v. Tenneco Polymers*, 602 F.Supp. 1394, 1400 (D.N.J. 1995); *Chesapeake Bay Foundation v. Bethlehem Steel*, 608 F.Supp. 440, 452 (D.Md. 1985); *Sierra Club v. Simkins Industries, Inc.*, Civ. No. HM 84-4018 et al., slip op. at 14-15 (D.Md. June 18, 1985); *SPIRG v. Fritzsche, Dodge & Olcott*, 579 F.Supp. 1528, 1538-39 (D.N.J. 1984); *aff'd.*, 759 F.2d 1131 (3d Cir. 1985)).

As a result, defendant's second allegation is also irrelevant. Nor is it relevant that defendant's BOD and TSS requirements were imposed by the Interstate Sanitation Commission (ISC), a tri-state environmental agency which does not, as a rule, require self-monitoring of effluent discharge levels. Defendant's DMR expressly requires defendant to monitor its TSS discharges in order to show compliance with ISC's restrictions. And while defendant's DMR does not expressly require monitoring of BOD levels, defendant apparently measured those levels anyway, and therefore must report those measurements by order of defendant's discharge permit. See Exhibit D to Plaintiff's Brief in Support of Their Motion for Partial Summary Judgment, at Part II, page 20, paragraph d(3).

Defendant has failed to present the court with new matters or controlling decisions relevant to my decision of January 13, 1986. Therefore, defendant's motion for reargument is denied.

Section 1291(b) of Title 28 of the United States Code provides in full:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an

immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

In *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974) the Third Circuit stated that § 1292:

... imposes three criteria for the district court's exercise of discretion to grant a § 1292(b) certificate. The order must (1) involve a 'controlling question of law,' (2) offer 'substantial ground for difference of opinion' as to its correctness, and (3) if appealed immediately 'materially advance the ultimate termination of the litigation.

496 F.2d at 754. Continuing, the court stated that § 1292 be applied so as to effectuate the policies favoring interlocutory appeal, including:

... the avoidance of harm to a party pendente lite from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense.

496 F.2d at 756. Therefore, before I may certify an order for immediate appeal under § 1292(b), I must determine that the order involves a controlling question of law, that that question of law provides substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation. This determination must be made in service of the policies identified in *Katz*.

Defendant has isolated two issues from my January 13 opinion on which it seeks certification under § 1292(b). Both issues relate to my determination in the January 13 opinion that plaintiffs had standing to assert their claims. In my opinion, I found that plaintiffs had standing to sue under the citizen-suit provisions of FWPCA, 33 U.S.C. § 1365(a)(1)(1982), because plaintiffs met the test for minimal Article III standing as defined by the Supreme Court in *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982). Specifically, I found it to have been sufficiently shown that 1) plaintiffs had suffered a direct injury, 2) that injury could fairly be traced to defendant, and 3) that injury was redressable by a judgment holding defendant liable to plaintiffs. Opinion of January 13, 1986 at 10-19. See *Valley Forge*, 454 U.S. at 472.

Defendant moves to certify my determination that plaintiffs met parts 2 and 3 of the *Valley Forge* test. Defendant states that:

The issues for which certification is sought are:

(1) 'Prior to a determination that there is standing of citizen group plaintiffs in a suit brought under Section 1365 of the Federal Water Pollution Control Act, 33 U.S.C.A. 1251 et seq.:

(a) Must plaintiffs demonstrate that there actually is a causal relationship between the conditions complained of by plaintiffs and defendant's operations, especially where defendant denies and contests same through the submission of expert certifications to the Court;

(b) Further, is "general deterrence" a legally sufficient basis to support a finding of standing, or must the Court first determine — if challenged by defendant — that the conditions complained of by plaintiffs can be redressed by relief directed against the named defendant; especially in a situation where defendant has submitted expert certifications to the Court that it (defendant)

neither causes nor contributes to the conditions allegedly aggrieving plaintiffs.

Defendant's Brief in Support of Notice of Motion to Amend Order of January 13, 1986 and to Include Section 1292(b) Certification, at 1.

At the outset, I find that it is not clear whether immediate appeal of these issues may materially advance the ultimate termination of the litigation. My decision of January 13, 1986 established defendant's liability under FWPCA. All that remains for resolution of this case at the trial court level are issues of remedy. This should not take long. Assuming *arguendo* that the remedy stage of trial involves complicated issues which cannot be resolved forthwith, it is still unlikely that § 1291(b) certification would be appropriate.

The Committee of the Judicial Conference of the United States, which proposed 28 U.S.C. 1291(b), stated:

[Section 1292(b)] should be and will be used only in exceptional cases where a decision of the appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases It is not thought that district judges would grant the certificate in ordinary litigation which could otherwise be promptly disposed of

Report of the Committee on Appeals from Interlocutory Orders to the Judicial Conference, 1958 U.S. Code Cong. & Admin. News 5260-5261.

Thus, interlocutory appeals are appropriate only when trial court litigation is expected to be especially lengthy and burdensome. Defendant has offered nothing to support the conclusions that this case will impose so unusual a burden on the parties or this court.

I note that in the *Katz* case, the Third Circuit emphasized that the district court is generally well-enough informed about

a case to form a reliable opinion regarding the prospects for materially advancing the course of litigation. 496 F.2d at 755.

Not only does defendant's request for immediate appeal fail to offer sufficient hope of advancing this litigation, it also fails to isolate issues which provide substantial ground for difference of opinion. My determination that plaintiffs had met part 2 of the *Valley Forge* test was based on my conclusions, first, that defendants' DMRs constituted admissions that defendant had violated its discharge permits for the Kill Van Kull, Opinion of January 13, 1986, at 37 (a conclusion which I have refused to reconsider, *supra*), second, that a violation of a discharge permit constitutes under FWPCA, a per se act of pollution, Opinion at 17, and third, that the pollution of the Kill Van Kull had injured plaintiffs, Opinion at 15. Defendant apparently believes that a stronger showing of causation than this is required to establish standing under the citizen-suit provision of FWPCA. Defendant has failed, however, to cite any authorities in support of this contention. Indeed, defendant makes much of its observation that "no appellate precedent" has addressed the issue of what constitutes minimally sufficient standing in FWPCA cases. Defendant's Brief at 4. In contrast, at least five district courts have found sufficient causation to establish standing in suits virtually identical to the suit in this case. *SPIRG v. AT&T Bell Laboratories*, 617 F.Supp. 1190, 1202 (D.N.J. 1985); *SPIRG v. Georgia-Pacific Corp.*, 615 F.Supp. 1419, 1423-25 (D.N.J. 1985); *SPIRG v. Tenneco Polymers, Inc.*, 602 F.Supp. 1394, 1397 (D.N.J. 1985); *Chesapeake Bay Foundation v. Bethledem Steel Corp.*, 608 F.Supp. 440, 446 (D.Md. 1985); *Sierra Club v. Kerr-McGee Corp.*, 23 ERC 1685, 1688 (W.D.La. 1985). Therefore, I conclude that the issue of sufficient causation to establish citizen standing under FWPCA is not an issue "as to which there is substantial ground for difference of opinion" sufficient to justify certification under § 1292(b).

My determination that plaintiffs had met part 3 of the *Valley Forge* test is similarly without "substantial ground for difference of opinion." In my January 13 opinion, I found that plaintiffs' injuries were redressable by a judgment against defendant

because such a judgment would prevent defendant specifically from polluting the Kill Van Kull and would generally deter others from polluting the Kill Van Kull. Opinion at 18-19. In reaching this conclusion, I was guided by Judge Stern's opinion in *SPIRG v. AT&T Bell Laboratories*, 617 F.Supp. at 1200, as well as the federal EPA's policy on civil penalties, as quoted in *SPIRG v. AT&T*, 617 F.Supp. at 1201. In the face of this support for my conclusion, defendant cites no authorities to the contrary.

Because defendant has failed to meet at least 2 of the 3 criteria for § 1292(b) certification, I deny defendant's motion to certify my standing determination for interlocutory appeal. In doing so, I reject a theme running strongly through defendant's argument, that certification is appropriate on any controlling issue of law on which the district courts have yet to receive appellate instruction, as clearly inapposite to the 3-part test under § 1292.

Finally, I consider plaintiffs' motion to amend my order of January 13, 1986. In that order, along with its attachments, I listed 154 DMR violations for which defendant was found liable. That list covered defendant's known violations, as revealed by defendant's DMRs, through August 1984. After first submitting to the court documentation of these 154 violations, plaintiffs submitted on three separate occasions updated summary lists of further alleged violations. All of these submissions preceded my January 13, 1986 order. That order, however, referred only to the 154 violations originally documented by plaintiffs. Plaintiffs now move to amend the order to include the 46 additional violations alleged to have occurred after August 1984, and described in the last of the three updated summary lists submitted by plaintiffs.

Plaintiffs' submissions regarding the original 154 violations, for which I have already found liability, include copies of the relevant DMRs, a summary list of the violations, and the affidavit of Loc P. Nguyen, who identified the relevant DMRs, prepared them for submission to the court, and prepared the summary list. Exhibits E, F, and G to Plaintiffs' Brief in Support of Their Motion for Partial Summary Judgment. Plaintiffs'

final updated submission included only a summary list and copies of the relevant DMRs. I shall amend my order of January 13, 1986 to include the additional 46 violations noted by plaintiffs upon submission of an affidavit by plaintiffs affirming that the summary copies of the DMRs and the summary list accurately reflect the relevant contents of defendant's DMRs regarding FWPCA violations after August 1984. In conditionally granting plaintiffs' motion to amend my January 13 order, I reject defendant's arguments that recent dealings between defendant and New Jersey state environmental officials supercede FWPCA and its civil liability provisions.

In conclusion, I deny defendant's motion for reargument and defendant's motion for § 1292(b) certification. I shall amend my order of January 13, 1986 as requested by plaintiffs upon their submission of the appropriate supporting papers.



APPENDIX F

APPENDIX F
ORDER & OPINION DISTRICT COURT
1/31/86

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

STUDENT PUBLIC INTEREST	:	
RESEARCH GROUP OF N.J.,	:	
Inc., <i>et al.</i> ,	:	HON. HAROLD
	:	A. ACKERMAN
Plaintiffs,	:	
	:	Civil No.
v.	:	No. 84-340 A
P.D. OIL & CHEMICAL STORAGE,	:	
INC.,	:	ORDER
	:	
Defendants.	:	

Upon consideration of plaintiffs' motion for partial summary judgment, and the briefs submitted by all parties in support of opposition thereto, it is this 13th day of January, 1986,

ORDERED, that plaintiffs' motion for summary judgment on the issue of the defendant's liability for its violations of the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, as set forth in the attached Appendix and in supplements thereto, is granted, and it is further,

ORDERED, that this case shall proceed on the issue of the appropriate remedies for the defendant's violations of the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*

/s/Harold A. Ackerman

HAROLD A. ACKERMAN
UNITED STATES DISTRICT
COURT JUDGE

Chronological Listing of P.D. Oil Permit Violations¹

<u>DMR</u>	<u>Parameter</u>	<u>Permit Limitation Amount</u>	<u>Type</u>	<u>Reported Amt./Value</u>	<u># of Ex.</u>
09/01/77	TOC	20 mg/l	AC	231 mg/l	1
	TOC	40 mg/l	MC	480 mg/l	1
12/02/77	TOC	20 mg/l	AC	739 mg/l	1
	TOC	40 mg/l	MC	2512 mg/l	1
03/01/78	TOC	20 mg/l	AC	1090 mg/l	1
	TOC	40 mg/l	MC	2425 mg/l	1
06/01/78	TOC	20 mg/l	AC	452 mg/l	1
	TOC	40 mg/l	MC	555 mg/l	1
	P-H	10 mg/l	AC	688 mg/l	1
	P-H	15 mg/l	MC	1475 mg/l	1
	Cr-Hex	.05 mg/l	AC	.1 mg/l	1
	C-H	1 mg/l	MC	4 mg/l	1
09/01/78	P-H	10 mg/l	AC	15.7 mg/l	1
	P-H	15 mg/l	MC	39 mg/l	1
	Cr-Hex	.05 mg/l	AC	.1	1
12/01/78	pH	9SU	M	9.5 SU	1
	P-H	10 mg/l	AC	16.7 mg/l	1
	P-H	15 mg/l	MC	28 mg/l	1
03/01/79	P-H	10 mg/l	AC	12.6 mg/l	1
	P-H	15 mg/l	MC	20 mg/l	1
06/1/79	P-H	10 mg/l	AC	13.2 mg/l	1

¹ Abbreviations used in this listing may be found in the attached List of Abbreviations.

Chronological Listing of P.D. Oil Permit Violations Page 2

09/01/79	P-H	10 mg/l	AC	16 mg/l	1
	P-H	15 mg/l	MC	17 mg/l	1
12/01/79	P-H	10 mg/l	AC	15.4 mg/l	1
	P-H	15 mg/l	MC	22 mg/l	1
03/01/80	P-H	10 mg/l	AC	11.50 mg/l	1
	P-H	15 mg/l	MC	18 mg/l	1
06/01/80	P-H	10 mg/l	AC	36.4 mg/l	1
	P-H	15 mg/l	MC	78 mg/l	1
	pH	9 SU	M	11.2 SU	1
12/01/80	pH	9 SU	M	10.2 SU	1
	P-H	10 mg/l	AC	37.4 mg/l	1
	P-H	15 mg/l	MC	46.6 mg/l	1
	C-H	1 mg/l	MC	31 mg/l	1
03/01/81	pH	6 SU	Min.	1.8 SU	1
	pH	9 SU	M	10.2 SU	1
	P-H	10 mg/l	AC	54.3 mg/l	1
	P-H	15 mg/l	MC	120 mg/l	1
03/01/81	C-H	1 mg/l	MC	54 mg/l	1
06/01/81	BOD	30 mg/l	AC	144.2 mg/l	1
	BOD	45 mg/l	MC	210 mg/l	1
	COD	150 mg/l	MC	2230 mg/l	1
	pH	6 SU	Min.	2.7 SU	1
	TSS	30 mg/l	AC	130.3 mg/l	1
	TSS	45 mg/l	MC	730 mg/l	1
	O&G	15 mg/l	MC	44 mg/l	1
09/01/81	BOD	30 mg/l	AC	40.75 mg/l	1
	BOD	45 mg/l	MC	53 mg/l	1

Chronological Listing of P.D. Oil Permit Violations Page 3

	COD	150mg/l	MC	400 mg/l	1
	pH	9 SU	M	11.7 SU	1
02/01/81	BOD	30 mg/l	AC	86 mg/l	1
	BOD	45 mg/l	MC	190 mg/l	3
	COD	150 mg/l	MC	850 mg/l	4
	pH	9 SU	M	10.7 SU	1
	TSS	30 mg/l	AC	47 mg/l	1
	TSS	45 mg/l	MC	130 mg/l	1
	O&G	15 mg/l	MC	21 mg/l	1
03/01/82	BOD	30 mg/l	AC	1490 mg/l	1
	BOD	45 mg/l	MC	3800 mg/l	3
	COD	150 mg/l	MC	1120 mg/l	4
	pH	9 SU	M	11.8 SU	1
	O&G	15 mg/l	MC	17 mg/l	1
06/01/82	BOD	30 mg/l	AC	475 mg/l	1
	BOD	45 mg/l	MC	1290 mg/l	3
	COD	150 mg/l	MC	1800 mg/l	4
	pH	6 SU	Min.	5.1 SU	1
	TSS	30 mg/l	AC	32.2 mg/l	1
	TSS	45 mg/l	MC	52 mg/l	1
06/82	BOD	30 mg/l	AC	60 mg/l	1 ²
07/82	BOD	30 mg/l	AC	77 mg/l	1
12/01/82	BOD	30 mg/l	AC	69.5 mg/l	1

² An asterisk indicates that the monthly average reported is contained in a letter attached to the DMR for the period ending August 31, 1982. See Ex. E. While these values, as well as the values for COD for June and July 1982, also violate the permitted maximum limitation, those violations are presumably encompassed in the number of excursions shown in the DMR and listed above.

Chronological Listing of P.D. Oil Permit Violations Page 4

	BOD	45 mg/l	MC	170 mg/l	1
	COD	150 mg/l	MC	680 mg/l	1
	pH	9 SU	M	11 SU	1
	O&G	15 mg/l	MC	19.3 mg/l	1
03/01/83	BOD	30 mg/l	AC	698.33 mg/l	1
	BOD	45 mg/l	MC	1600 mg/l	3
	COD	150 mg/l	MC	4100mg/l	3
	pH	9 SU	M	10 SU	3
	TSS	30 mg/l	AC	33 mg/l	1
	O&G	15 mg/l	MC	104 mg/l	3
06/01/83	BOD	30 mg/l	AC	1883.33 mg/l	1
	BOD	45 mg/l	MC	4300 mg/l	3
	COD	150 mg/l	MC	9200 mg/l	3
	pH	9 SU	M	11.3 SU	3
	TSS	45 mg/l	MC	49 mg/l	3
	O&G	15 mg/l	MC	37 mg/l	3
09/01/83	BOD	30 mg/l	AC	35 mg/l	1
	BOD	45 mg/l	MC	71 mg/l	3
	COD	150 mg/l	MC	260 mg/l	3
03/01/84	BOD	30 mg/l	AC	708 mg/l	1
	BOD	45 mg/l	MC	1600 mg/l	3
	COD	150 mg/l	MC	7900 mg/l	3
	pH	9 SU	M	9.1 SU	3
	O&G	15 mg/l	MC	110 mg/l	3
06/01/84	BOD	30 mg/l	AC	720 mg/l	1
	BOD	45 mg/l	MC	1300 mg/l	3
	COD	150 mg/l	MC	5700 mg/l	3

Chronological Listing of P.D. Oil Permit Violations Page 5

TSS	30 mg/l	AC	57 mg/l	1
TSS	45 mg/l	MC	58 mg/l	3
O&G	15 mg/l	MC	840 mg/l	3

List of Abbreviations

AC	Average concentration
BOD	Biological or biochemical oxygen demand
C-H	Chlorinated hydrocarbons
COD	Chemical oxygen demand
Cr-Hex	Chromium hexavalent
M	Maximum
MC	Maximum concentration
Min.	Minimum
O&G	Oil and Grease
P-H	Petroleum hydrocarbons
TSS	Total suspended solids
TOC	Total organic carbon

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

STUDENT PUBLIC INTEREST	:	CIVIL ACTION
RESEARCH GROUP OF N.J.,		No. 84-340
Inc., et al.,	:	

Plaintiffs	:	O P I N I O N
------------	---	---------------

v.	:	
----	---	--

P. D. OIL & CHEMICAL STORAGE,	:	
INC.,	:	

Defendant.	:	
------------	---	--

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ACKERMAN, District Judge.

This case was brought by two environmental conservation organizations, Student Public Interest Research Group of New Jersey [hereinafter "SPIRG"] and Friends of the Earth [hereinafter "FOE"], against P. D. Oil and Chemical Storage, Inc.

[hereinafter "P.D. Oil"] as a citizen suit under the Federal Water Pollution Control Act [hereinafter "FWPCA"], 33 U.S.C. § 1251 *et seq.* (1982).

Plaintiff's allege that defendant has violated and continues to violate Sections 301 and 402 of the FWPCA by failing to comply with the effluent limitations in its National Pollutant Discharge Elimination System/New Jersey Pollutant Discharge Elimination Systems permit [hereinafter "Discharge Permit"].

Plaintiffs have moved for partial summary judgment that defendant is liable for these violations. Defendants have moved to dismiss plaintiffs' complaint on various grounds and oppose the motion for partial summary judgment.

As an understanding of the factual setting of this dispute and the history of the FWPCA is important to the resolution of all of the issues raised by the parties, I turn first to these preliminary matters.

FACTS

Congress enacted the Federal Water Pollution Control Act in 1972. The 1972 statute represented a distinct change in federal water pollution control policy. Prior to 1972, the focus of federal water pollution law was on the quality of the receiving waters, which was to be protected through water quality standards. Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903. This system of pollution control led to substantial problems in enforcement because of the difficulty in establishing precise effluent limitations for particular pollutants on the basis of the water quality desired for the receiving bodies of water. See Federal Water Pollution Control Act Amendments of 1971, S. Rep. No. 414, 92d Congress, 1st Sess., 8, 12 (1971); reprinted in 1972 U.S. Code Cong. & Ad. News 3668, 3675 and 3679. The effort to control weater pollution using only this method was found to be "inadequate in every vital aspect." S.Rep. No. 414, *supra*, 2 Legis. Hist. at 1425, 1972 U.S. Code Cong. & Ad. News at 3674.

The 1972 legislation contained "a major change in the enforcement mechanism of the federal water pollution control program from water quality standards to effluent limits." S. Rep. No. 414, *supra*, 1972 U.S. Code Cong. & Ad. News at 3675. Water quality standards for the receiving waters were retained as a measure of pollution control effectiveness, but "the basis of pollution prevention and elimination will be the application of effluent limitations" to particular polluters for particular pollutants. S. Rep. No. 414, *supra*, 1972 U.S. Code Cong. & Ad. News at 3675.

The goal of the FWPCA, as stated in 33 U.S.C. § 1251(a) (1) was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters..." and it was the stated national goal "that the discharge of pollutants into the navigable waters be eliminated by 1985."

This objective is implemented through Section 301(a) of the F.W.P.C.A., 33 U.S.C. 1311(a), which states:

Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

Thus, the FWPCA sets forth a total prohibition of the discharge of pollutants, except pursuant to specific authorization.

The FWPCA provides in Title IV, 33 U.S.C. 1341-1345, for the issuance of discharge permits. These permits are designed to allow progressively decreasing levels of pollutant discharges in order to improve the nation's waters. Compliance with a permit issued pursuant to one of these permit programs established by the FWPCA is deemed compliance with Section 301 and allows discharges which would otherwise be unlawful. *See* 33 U.S.C. 1342(k) and 1344(p).

Plaintiffs allege that, conversely, noncompliance with a permit constitutes noncompliance with Section 301 and represents

a violation of the FWPCA. Defendants allege that non-compliance with a permit is not a violation of the FWPCA where such noncompliance is as a result of an "upset." An "upset" is defined as "an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permit fee. An upset does not include non-compliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.: See N.J.A.C. 7:14:A-1.9 (1984 Supp.).

For reasons which I will describe *infra*, defendant's allege that they were operating in an "upset" condition. The permit program applicable in this case is established in Section 402 — the National Pollutant Discharge Elimination Systems (NPDES). Section 402(a)(1), 33 U.S.C. 1342(a)(1), authorizes the Administrator of the United States environmental Protection Agency (hereinafter "the Administrator" or "EPA") or a state if its permit program has been approved by the Administrator, to issue permits authorizing the discharge of pollutants "upon condition that such discharges will meet ... all applicable requirements under Sections 301, 302, 306, 307, 308, and 403." Thus, the NPDES is "a permit system whose function is to define the discharger's obligations under the Act by [setting] limitations designed for the discharger's particular operation." *Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F.Supp. 1528, 1531 (D.N.J. 1984).

NPDES permits issued under Section 402(a)(1) must comply with Section 308(a)(4)(A). The latter section requires the Administrator to require permittees to establish and maintain records, to install, use and maintain monitoring equipment, to sample effluents and to report to EPA in the manner prescribed by the Administrator. In implementing this section, the Administrator has prescribed regulations which require, as a condition to all permits, the reporting of all monitoring results in a Discharge Monitoring Report (DMR) at intervals which are to be specified in the permit. 40 C.F.R. 122.41(1)(4). The DMR

is a uniform, national form devised by EPA for the self-reporting of monitoring results. 40 C.F.R. 122.2.

Discharge permit number NJ 000.3361 was issued to defendant's predecessor in interest, El Dorado Terminals Corp., on May 30, 1974. The permit authorized El Dorado to discharge limited quantities of pollutants into the water from its facility through a single discharge point. The permit was modified in 1978 and a new permit was issued in 1981, which is in effect until April, 1986. Each permit specified effluent limitations for various pollutants.

The present permit holder, P.D. Oil, is located in Bayonne, New Jersey on the far eastern end of the Kill Van Kull [the "Kill"], which is one of the most highly industrialized waterways in the United States. The Kill is part of the greater Port of New Jersey and New York Channel complex and it links Newark Bay (to the east) with the Arthur Kill Channel to the west. The entire Bayonne shoreline of the Kill is industrialized with the single tail-end exception of the Kill Van Kull Park situated approximately (2) miles to the west of P.D. Oil. (See defendant's exhibit entitled "Land Uses Along the Kill Van Kull.").

P.D. Oil acquired the El Dorado site in Bayonne, New Jersey in July 1977. Defendants contend and plaintiff's do not dispute that the property was in desperate need of cleaning up and that P.D. undertook to do so.

P.D. is situated on approximately 30 acres and owns and operates nearly 170 tanks ranging in size from 20,000 to 1.1 million gallons capacity. P.D. receives bulk liquid commodities owned by others and holds them in the storage tanks for loading, upon instruction from the commodity owners, to rail cars, tank trucks or ocean going tankers (via the Kill Van Kull.).

P.D.'s discharges which are at the heart of this lawsuit are as a result of spillage, tank overflow and steam condensation which collects in P.D.'s collection system along with rain water and is

discharged through a four inch out fall pipe leading into the Kill. The amount of discharge varies, depending on the amount of rainfall.

P.D. has monitored this discharge regularly since June 1, 1977 via the DMR's required under their discharge permit. Plaintiff's contend that defendant's own report demonstrate that they have violated the permitted effluent limitations a total of 154 times. Plaintiffs submit that under FWPCA, these violations of permit limitations are automatically violations of the Act. As defendants have, by their own admission, violated the terms of their permit, plaintiffs contend that summary judgment is proper and should be granted on the issue of liability.

In addition to the procedural and jurisdictional issues raised by defendant, they oppose the plaintiffs' motion for summary judgment on the grounds that there are genuine material issues of fact in dispute. Defendants allege that they have operated within the permissible limits of their permit because:

1. They were operating under a declaration of an "upset,"
2. Plaintiffs have misstated the requirements and applicable effluent limitations under the discharge permit, and
3. The plaintiffs misinterpret and erroneously rely on the DMRs because the DMRs misstate the permit requirements.

Because defendants have raised a number of threshold issues which must be resolved before the merits of this case may even be considered. I consider first the issues raised by defendants.

Defendant has moved for the following relief:

1. To dismiss the complaint for lack of subject matter jurisdiction and/or for prudential reasons due to plaintiffs' lack of standing; or
2. For summary judgment for such relief;

3. To dismiss all counts for relief relating to discharges allegedly occurring before January 27, 1981, as barred by the statute of limitations;

4. To dismiss the complaint because plaintiffs are estopped from prosecuting same or because of laches; and/or because plaintiffs have waived their rights, if any, to do so; and/or because due process require dismissal;

5. For a site visit by the Court prior to determination of plaintiffs' motion for summary judgment and/or defendant's motions;

6. For abstention and remand to the New Jersey Department of Environmental Protection;

7. For relief and attorneys' fees under Rule 11 of the Federal Rules of Civil Procedure; and

8. For an evidentiary hearing on the standing question prior to determination of plaintiffs' summary judgment motion.

JURISDICTION

This court has jurisdiction pursuant to 33 U.S.C. 1365(a). Venue is appropriate in the District of New Jersey pursuant to 33 U.S.C. § 1365(c)(1) because the source of the alleged violations complained of is located within this District.

STANDING

This action is brought under the citizen suit provision of the FWPCA, 33 U.S.C. § 1365(a)(1). The standing conferred under this provision must be read in conjunction with the constitutional requirements for standing, which were clearly summarized in *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982). The Court stated:

[a]t an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened

injury as a result of ... putatively illegal conduct of the defendant,' ... and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision....' *Id.* at 472, *citations omitted*.

Under this test the standing of the plaintiffs must be examined in three respects:

1. There must be direct injury to these plaintiffs;
2. Their injury must fairly be traced to P.D.'s activities; and,
3. Plaintiff's injury must be redressable by a ruling holding P.D. liable.

Defendants have raised the standing issue as part of their motion to dismiss. Under rule 12(b)(1) of the Federal Rules of Civil Procedure, a party may move to dismiss for lack of jurisdiction over the subject matter based on the pleadings. However, where matters outside the pleadings are presented to the court, such as the depositions and affidavits submitted here, the motion is to be treated as one for summary judgment and disposed of as provided for in Rule 56. *See* F.R. Civ. Pro. 12(c).

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is not to be granted unless, after all reasonable inferences are drawn in favor of the non-moving party, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See Sames v. Gable*, 732 F.2d 49, 52 (3d Cir. 1984).

Defendant's motion to dismiss plaintiff's complaint may, therefore, not be granted unless all reasonable inferences are drawn in favor of plaintiffs, and plaintiffs' motion for summary judgment may not be granted unless all reasonable inferences are drawn in favor of defendant.

Defendant contends that there is no direct and palpable injury to either organizational plaintiff or to any individual

member of the organization. Secondly, defendant contends that, even if plaintiffs can show direct injury, their concerns are generalized panoramic environmental interests and that their grievances are not related in any cognizable way to defendant's conduct. As part of this argument, defendant contends that what they are putting into the Kill Van Kull are not pollutants even though some of the numbers in the discharge permit are in excess. Lastly, defendant contends that because of the uniquely industrial-commercial use of the Kill Van Kull now, and as planned for by governmental agencies, and the sewage outfalls and storm water runoffs and shipping in the Kill, the court cannot provide relief in this case to cure plaintiffs generalized complaints.

Addressing the first prong of *Valley Forge's* three-part test, defendant quotes extensively from depositions and affidavits of individuals the organizational plaintiffs rely on for standing in an effort to show that no injury in fact has been alleged. I find that, on the contrary, these depositions and affidavits illustrate in great detail the individual interests which are directly affected by defendants alleged acts.

A member of NJPIRG, Cheryl Cummings, stated in her affidavit that her family home is one block north of the Kill Van Kull. She and her family have used the part along the Kill Van Kull for the past 19 years. She uses the part for biking and jogging. She stated that "the water in the Kill Van Kull looks and smells terrible. The pollution in the Kill Van Kull has diminished my enjoyment of the park. The park is often not a pleasant place to be." In her deposition, Ms. Cummings testified that her enjoyment of the park was affected "by the general unpleasantness of the Kill Van Kull," and that the water has "a film" which is sometimes like a rainbow or sometimes like greenish-yellow" and that she would enjoy the park more if the water were cleaner. Her recreational and aesthetic interests clearly are directly affected by the condition of the water in the Kill Van Kull which plaintiff alleges is at least partially attributable to defendant's acts.

Sheldon Abrams, a member of Friends of the Earth, stated in his affidavit that he drives by the Kill Van Kull regularly and

has "noticed that the shores are black and there is an oily sheen on the water." He also boats in the Lower New York Bay into which the Kill Van Kull flows. He could boat and fish in the Kill Van Kull if it were cleaner, and would enjoy his recreational activities in Lower New York Bay more if the water flowing into it from the Kill Van Kull were cleaner. Mr. Abrams clearly has a direct recreational and aesthetic interest in the Kill. In addition, as Mr. Abrams eats the fish he catches in New York Bay, he has a health interest in the water there.

Another member of Friends of the Earth, Andrew Gerbino, stated in his affidavit that he "would hike and birdwatch on [the Kill Van Kull] if it were cleaner." He also stated his belief that the value of his home on Staten Island is decreased by the pollution in the Kill Van Kull and Lower New York Bay, which "makes Staten Island a less pleasant place to live." Mr. Gerbino noted in his deposition that he used to walk on the Staten Island side of the Kill, but no longer does so, in part "because it's not attractive." He further stated that the chemicals in the water create an air pollution or odor problem, which he has noticed "just opening my front door" and particularly "riding on the ferry, I could smell it getting into St. George, wind blowing from the west you can smell all those things, even on a Sunday when firings aren't operating." He also noted that he "can't eat any crabs or clams" caught in the area, although "all these waters used to be used for lobster catching and clamming, crab catching. You don't see anybody doing that anymore." There is no question that Mr. Gerbino is adversely affected by the pollution to which plaintiff alleges defendant has contributed.

Numerous other members of the plaintiff organizations testified to various recreational and aesthetic interest that are adversely affected by the pollution in the Kill. These individuals do not pursue their interest in birdwatching, tennis, jogging, bicycling or fishing to the extent they would like to, if at all, due to the pollution. Defendants have not disputed that these individuals do indeed have these interests. Under *Sierra Club v. Morton*, 405 U.S. 727 (1972), "injury for standing purposes need not be economic; it can be injury to aesthetic, recreational

or environmental values." *Id.* at 735. See also *Middlesex county v. National Sea Clammers*, 453 U.S. 1, 16-17 (1981). Plaintiffs have met the first prong of the *Valley Forge* test.

Defendants address the second prong of this test by contending that plaintiff's interests are not related in any cognizable way to defendants conduct and that defendant does not pollute the Kill.

The first part of defendant's argument has already been addressed by at least two of my colleagues in great depth, and I find their rulings persuasive on this issue. Plaintiffs are not required to show that a certain percentage of the pollution that affects their interests is traceable to defendant's effluent. As Judge Stern explained in *Student Public Research Group v. AT&T Bell Laboratories*, 617 F.Supp. 1190, 1202 (D.C.N.J. 1985), Congress did not intend to require plaintiffs "under the FWPCA to isolate and define the injury from a particular polluter in order to show a violation," as such a requirement "would defeat the purpose of the FWPCA and other pollution-control laws. In general, numerous polluters contribute to an environmental harm like pollution of rivers. It is not possible to divide up the general harm and allocate shares to particular polluters. This was why Congress enacted the 1972 amendments to the FWPCA that abandoned permit limits based on the impact of discharges on water quality and adopted permit limits based on technological controls on polluting facilities."

Defendant's argument that they are not the ones causing plaintiff's interest to be harmed because of all the other pollution that is put into the Kill has been made many times before, and when taken to its logical conclusion, allows plaintiffs to sue no polluters unless they can sue all in one action. This is not the intent of the FWPCA.

In addition, I note Judge Brotman's equally appropriate reaction to this specific causation theory. He noted in *Student Public Interest Research Group v. Georgia-Pacific Corp.*, Civ. No. 84-1063 (slip. op. Aug. 19, 1985) that:

Defendant asks the court to find that the company's effluents do not cause actual harm even though the

court may later determine that such effluents violate defendant's permit, and so, the Clean Water Act, *Consequently, defendant would have the Court apply a stricter test for standing than for liability itself. See id.*, Slip op. at 8.

Defendant argues that it does not pollute even though it has reported violations of its permit under the Clean Water Act. Defendant alleges that what it discharges into the Kill are not pollutants. This, however, is not the issue before me. Congress has already made a determination of what effluents it considers violative of the Clean Water Act — these effluents are limited in accordance with defendant's discharge permit. Under the statutory scheme set up by Congress, it is not the court's role to determine whether defendant is polluting the Kill Van Kull, rather the court's role to determine whether the FWCPA, specifically 33 U.S.C. § 1342(k) and § 1344(p), has been violated.

Plaintiffs show causation merely by showing violations of the discharge permits, thus, further discussion of this issue will await my discussion of the merits of this case. Plaintiffs meet the second part of the *Valley Forge* test if they show these violations.

Lastly, defendants contend that plaintiffs' injury cannot fairly be redressed by a favorable decision. *See Valley Forge* at 472. Once again, defendants ignore the reasons for the enactment of 1972 amendments to the FWPCA.

Judge Stern also addressed this argument in detail in *SPIRG v. AT&T*, *supra*. He held that plaintiffs in a suit such as this one are the beneficiaries of a legislative grant of standing in § 505 of the FWPCA, 33 U.S.C. § 1365 (1982). They have met the minimal Article III showing of "a distinct and palpable injury" to themselves, and if their suit is successful, "the general public will benefit." *SPIRG v. AT&T* at 1200. In addition, plaintiff's suit will deter other polluters of the same waterways. Congress intended both general and specific deterrence to be a purpose of the sanctions under the FWPCA. *See* Judge Stern's opinion, *supra* at 1201 quoting, *U.S. Environmental Protection Agency, Policy on Civil Penalties, E.P.A. General Enforcement Policy*

GM-21, (Feb. 16, 1984). Plaintiffs have standing to redress their injuries by seeking relief in the form of general deterrence. As there are no disputed issues of material fact relevant to the determination of plaintiffs' standing, defendant's request for an evidentiary hearing is denied.

STATUTE OF LIMITATIONS

Defendant next contends that plaintiffs' claims are time barred under 28 U.S.C. § 2415(b). Defendant argues that a three year statute of limitations applies to plaintiffs' claims.

A three year statute of limitations would significantly alter the posture of this case. For example, defendant has had no N.J.P.D.E.S. effluent standard for cadmium or styrene since 1981, and all effluent limitations for petroleum hydrocarbons and chlorinated hydrocarbons were eliminated in 1981. Plaintiffs seek to impose liability for alleged violations in the 1970s of standards pertaining to cadmium, styrene, petroleum hydrocarbons and chlorinated hydrocarbons. In 1978, defendant reported that there was no styrene at the facility, and the EPA accepted that report. Defendant contends that it is prejudiced by having to defend its records on this issue where the EPA required no further records, and, thus, none were maintained. I find this reasoning unpersuasive in convincing me to apply any statute of limitations to this suit. No other federal statute of limitation applies to actions brought by EPA to enforce NPDES/NJPDES permits under the Act. Defendant cites *Del Costello v. Teamsters*, 103 S.Ct. 2281 (1983) in support of its general proposition that the Court should adopt a federal statute of limitations. *DelCostello* concerned an employees action against his union for breach of its duty of fair representation.

In *DelCostello*, the question before the Court was whether, in the absence of a statute of limitations in the federal statute granting the right of action, a state statute should be borrowed. The Court rejected a state limitation period, finding that in light of the federal policies of the statute, an analogous federal limitation period should be applied. 103 S.Ct. at 2289. The test applied was whether the state rule would further federal purposes or be "at odds with the purpose or operation of federal

substantive law." *Id.*, note 12. However, the Court expressly noted that the substantive federal policies may require that no limitations period at all apply, state or federal. *Id.* at 2293, n.20.

Here, I find that it would contravene the substantive federal policy of the FWCPA to impose a statute of limitations as defendant requests. Here, plaintiffs' act as EPA's surrogate enforcers. Plaintiffs suing under § 505 are suing as private attorneys general on behalf of EPA and the states. See *Middlesex County Sewerage Authority*, *supra*, 453 U.S. at 16-17. The application of a federal limitations period to NPDES enforcement actions would seriously distort the enforcement scheme Congress has established. That enforcement scheme places primary enforcement responsibility in the hands of the states. 33 U.S.C. § 1251(b), 1319. If the states fail to enforce NPDES permits, however, either EPA or citizens may assume the states' responsibility. S.Rep. No. 414, 92 Cong., 1st Sess. (1971), p. 64, 1972 (Code Cong. & Ad. News 3747. Citizens can equally sue if the EPA fails to carry out enforcement responsibilities. *Id.*

If the EPA brought this suit no state statute of limitations should be borrowed. See *SPIRG v. AT&T*, *supra* at 1202, citing *United States v. Summerlin*, 310 U.S. 414, 416 (1940) and *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978).

If a federal limitations period is deemed applicable to actions brought by citizens, it would significantly reduce the effectiveness of citizen enforcement when the states or the EPA fail to carry out their responsibilities. Congress intended the citizens to be able to substitute for the EPA and the states if these governmental agencies failed to enforce NPDES permits. See Senate Report No. 414, *supra* p.65.

As Judge Stern noted:

We have seen already that Congress sought to promote regulatory uniformity by providing identical enforcement mechanisms for citizen and governmental suits under the FWPCA. The major purpose of the policy favoring uniformity is to prevent states from trying to outbid their neighbors for industries and jobs by maintaining lower pollution standards. *SPIRG v. AT&T*, *supra* at 1202.

In addition to the lack of any federal substantive policy in favor of the statute of limitations defendant seeks, defendant is not prejudiced by the lack of a statute of limitations. Although defendant claims that unless there is a three-year limitation period imposed, it will be unable to challenge the assertions that it has violated its permit, it quotes from a 1978 report it sent to the EPA. Obviously, defendant has the material at hand which relates to plaintiffs' claims. Defendant also has recourse to EPA and state agency files for any records it has not retained. I hold, therefore, that no statute of limitations is applicable to the instant action.

ABSTENTION

Defendant contends that this case should be dismissed under the abstention doctrine because it unduly interferes with state administrative efforts to require defendant's compliance with its permit. This argument need not detain us long. As should already be clear from my previous discussion, Congress intended citizen suits to supplement state governmental action. One does not preclude the other under the scheme set up under the FWPCA. I will, therefore, not abstain from ruling in this case due to state administrative efforts in the same area.

LACHES

Defendant also contends that plaintiffs are estopped or that laches apply. I do not agree.

The law is established that the defense of laches may not be asserted against the government. The Supreme Court has consistently held that laches is no defense to a suit to enforce a public right or protect a public interest. *United States v. Summerlin*, 310 U.S. 414, 416 (1970); *United States v. California*, 332 U.S. 19, 39-40 (1947); *Utah Power and Light Co. v. United States*, 243 U.S. 389, 409 (1917). The rule is founded on two basic concerns: 1) the magnitude and importance of the rights at stake when the interests of the public are asserted; and 2) the determination that those rights cannot be compromised or forfeited by the negligent or illegal acts of those who act not for themselves but only as guardians of the public, *United States v. California*, *supra* at 39-40.

These same policies are at stake in actions to enforce discharge permits under the FWPCA. Congress' objective in enacting this legislation was "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Senate Committee report stated that it included a provision in the policy declaration of the act (28 U.S.C. § 1251(e)) encouraging public participation in the enforcement process "because the Committee recognizes that the manner in which the measures are implemented will depend, to a great extent, upon the pressures and persistence which an interested public can exert upon the governmental process. S. Rep. No. 414, *supra*, p.12.

As citizen plaintiffs stand in the shoes of the government "as private attorneys general," it makes no sense to apply laches in a citizen suit. Citizen plaintiffs should not have fewer rights to enforce the statute than government agencies. Plaintiffs are, therefore, not estopped or barred by laches.

RULE 11

Defendant has also moved for sanctions under Rule 11 of the Federal Rules of Civil Procedure, alleging that plaintiff has instituted this litigation in bad faith. I find this motion frivolous and will now waste the court's time addressing it. My holding on this motion demonstrates that I do not find that plaintiffs attempts to settle this case in exchange for donations and attorney fees were in bad faith.

"UPSET" CONDITION

Defendant contends that summary judgment in favor of plaintiffs should be denied for a number of reasons, the first of which is that defendant operated "in compliance" and under a declaration of "upset."

The EPA regulations allow permittees to raise certain affirmative defenses to allegations of permit violations such as an upset. An "upset" is an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. 40 C.F.R. § 122.41(h) (1984).

In its preamble to this regulation, EPA stated (44 Fed. Reg. 32854, 32863 (June 7, 1979)):

Violations of stricter state standards or *water quality based effluent limitations* are not subject to a defense of upset. (emphasis added)

EPA recently reaffirmed this limitation on the upset defense, stating that it is "not available to permittees for violations of water quality based permit conditions." 49 Fed. Reg. 38039 (September 26, 1984)

EPA's regulations specifically provide that all state programs must be administered in conformance with EPA's requirements for an upset defense. 40 C.F.R. 123.25(a)(12). Consequently, NJDEP's regulations similarly provide (N.J.A.C. 7:14A-3.10(c)):

1. Effect of an upset. An upset may constitute an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of paragraphs (c)2. of this section are met. Where no determination was made during administrative review of claims that noncompliance was caused by upset, and there has been no Departmental action for noncompliance, the lack of such determination is final administrative action subject to judicial review.
2. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
 - i. An upset occurred and that the permittee can identify the specific cause(s) of the upset;
 - ii. The permittee facility was at the time being properly operated; and
 - iii. The permittee submitted notice of the upset as required in paragraph (a) of this section.
 - iv. The permittee complied with any remedial measures required under 2.5(d).

3. Burden of proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

N.J.A.C. 7:14-3.10(c).

Defendant's permit provides that the effluent limitations for biological oxygen demand and total suspended solids are based on state water quality standards. Violations of these limitations therefore are not subject to the upset defense. Fifty-four of defendant's 164 permit violations fall in this category.

Defendant's upset defense is also inapplicable to permit violations prior to August 13, 1979.

EPA's upset regulation became effective on August 13, 1979. 44 Fed. Reg. 32854 (final rule). Prior to that time, EPA's regulations did not provide for an affirmative defense to enforcement actions. 43 Fed. Reg. 37078 (Aug. 21, 1979) (proposed rule). EPA's pre-1979 policy on the upset provision is contained in a March 16, 1977, decision of its general counsel. NPDES Decision of the General Counsel. In that opinion, EPA concluded that, "[i]f effluent limitations guidelines are applicable, but do not address the availability of upset and maintenance conditions, or if no effluent limitations guidelines have been promulgated," the Regional Administrator may consider inserting an upset provision in a specific NPDES permit. *Id.* at 331.

Defendant has presented no evidence that, prior to August 13, 1979, its permit was based on effluent limitations guidelines containing an upset provision. Defendant's permit did not contain an upset provision until March 2, 1981. Consequently, defendant had no right to an upset defense for the 21 violations occurring prior to that date.

The burden is on defendant to demonstrate that each of its violations satisfy all of the requirements of the upset regulation. 40 C.F.R. 122.41(n)(4); N.J.A.C. 7:14A-3.10(c)(3). Those requirements are specific and detailed (40 C.F.R. 122.41(n)(3));

A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly

signed, contemporaneous operating logs, or other relevant evidence that:

(i) An upset occurred and that the permittee can identify the causes(s) of the upset;

(ii) The permitted facility was at the time being properly operated;

(iii) The permittee submitted notice of the upset as required in paragraph (1)(6)(ii)(B) of this section (24 hour notice); and

(iv) The permittee complied with any remedial measures required under paragraph (d) of this section [40 C.F.R. 122.41(d)].

In addition, the definition of upset in 40 C.F.R. 122.41(n)(1) requires that an upset be an "exceptional" incident, that it be "unintentional and temporary," that it be "beyond the reasonable control of the permittee," and that it not be caused by "operational error improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operators." NJDEP's upset regulation contains similar requirements, including the requirement of a minimum of 24-hour notice. N.J.A.C. 7:14A:3.10(c)(2) and 3.10(a)(v).

Defendant has provided no evidence that satisfies any of these requirements for any particular permit violation alleged by plaintiffs. Instead, defendant broadly asserts that all of its permit violations qualify as upsets. EPA's regulations do not permit this type of blanket defense. They require that defendant demonstrate through relevant evidence that each upset is "an exceptional incident" and meets all the other requirements of the regulation. For example, EPA's regulations require that the defendant show that it provided EPA and NJDEP with 24-hour notice. Defendant's upset defense is defective as a matter of law as to all of its violations on this ground alone.

Defendant has presented EPA compliance inspection reports in which an EPA employee stated that some permit violations were due to an "upset" condition at defendant's facility. I find

that defendant attempts to use these reports and the "upset" issue as a smokescreen to obfuscate the true facts of this case. These reports do not establish an EPA finding that there was an upset. A compliance inspection report is not a formal agency determination. The comments of the EPA employee in the inspection report constitute, at most, a determination by that employee that the EPA should exercise its discretion not to prosecute the relevant permit violations. There is no basis for giving that opinion any weight in this proceeding where defendant has made no independent effort to submit any evidence that it meets each requirement of the upset regulation. Defendant's upset defense is invalid, therefore, for this reason also.

Because I find that there has not been an EPA administrative determination of an upset, there is no need to reach the issue of whether plaintiffs have waived their right to challenge EPA's designations of upsets.

Secondly, defendants contend that summary judgment may not be granted because plaintiffs misstate the requirements and applicable effluent limitations which defendants NJPDES permit regarding, among other things, biological oxygen demand (B.O.D.), total suspended solids (T.S.S.), and oil and grease. Lastly, defendants contend that plaintiffs misinterpret and rely erroneously on the DMRs because the DMRs themselves dramatically misstate the permit requirements and thus present a confused and misleading portrait of defendants discharge and the applicable effluent limitations.

Defendant's arguments are more properly with Congress than with the Court.

Under the law and under EPA's interpretation, violations of permit limitations are violations of the law. EPA's position is stated in its Enforcement Management System guide (Technical Review Criteria) (1977):

Screening based upon the Technical Review Criteria *does not* establish which deviations from the effluent limitations are violations of the permit or of the Federal Water Pollution Control Act — all such

deviations, unless specifically authorized elsewhere in the permit, *are violations*. (emphasis in original)

Second, defendant relies on inspection reports which, in some instances, stated that defendant was found to be "in compliance." Defendant, however, chooses to ignore the series of letters sent to it by EPA and New Jersey DEP informing it of its persistent violations and the agencies' concern. For example, in letters dated November 7, 1980 and September 1, 1981, defendant was informed that its discharge appeared not to comply with its effluent limitations, and was requested to provide information regarding:

The steps taken or planned to reduce and eliminate the noncompliance;

The steps taken, or planned, or being taken to prevent recurrence of the condition and to ensure future compliance with permit limitations.

On November 2, 1981, the Chief of the water Enforcement Branch for EPA, Region 2, wrote to defendant regarding its recent DMRs, which showed that it had exceeded its permit limitations. The letter states:

A review of past DMRs reveals a serious and persistent pattern of violations. It is necessary that the corrective measures you are taking be sufficient to ensure future compliance. Consistent excursions of your permit limitations can result in enforcement action under the provisions of the Clean Water Act.

On December 9, 1981, New Jersey DEP wrote to defendant, pointing out that its "effluent exceed[ed] the Permit limits for BOD₅, COD, pH, and Oil and Grease." On February 10, 1982, EPA again wrote to defendant, noting that while the reported values for BOD and COD has improved, they were "concerned about the continuous nature of these violations."

On June 18, 1982, EPA responded to defendant's explanation of its exceedances, again stating that they were "concerned about your continuous violations and would like to be assured that progress is being made, as was implied by your letter."

Finally, in April 1984, an inspection of the defendant's facility resulted in a report giving defendant's status as "serious deficiencies/violations (enforcement action recommended)," noting that "permittee still in violation of effl[uent] limit[at]ions," that "construction has not eliminated viol[at]ions as planned," that "treatment needs expansion," that "reviewing DMRs and permittee's records show violations still exist," and that "discharge effluent violation still exist, no change since issuance of permit." In short, defendant had been and continued to be in violation of its permit.

As to inaccuracies and inconsistencies defendant contends are present in the DMR forms, I find that the permit is not incorrect or inconsistent. It reflects the regulatory structure established by the Act. The Act envisions both general technology-based effluent limitations (33 U.S.C. 1311(b)(1)(A)) and specific limitations adopted to achieve identified water quality standards (33 U.S.C. 1311(b)(1)(C)). The "technology-based treatment requirements under section 301(b) of the Act represent the minimum level of control that must be imposed in a [NPDES] permit." 40 C.F.R. 1245.3. Where water quality standards have been adopted, the permit may impose stricter effluent limitations in order to achieve those standards. 33 U.S.C. 1311(b)(1)(C); 40 C.F.R. 122.44(d). The stricter limitations are controlling. *Id.*

Here, the State of New Jersey has adopted water quality standards for the waters of the State, including the Kill Van Kull. These are reflected in Part B of the defendant's permit, which is entitled "State Requirements." The Kill Van Kull is classified as TW3 waters. *Id.* For such waters, the water quality standards include, for oil and grease and TSS, a "none noticeable" standard. *Id.* This is not a permit limitation. It is a water quality standard.

Water quality standards are to be achieved through permit limitations. Here, the oil and grease limitation (15 mg/l) is stated in Part A of the defendant's permit, the part imposed by EPA. *Id.* at 219a. Since no state limitation is imposed in Part B, the limitation set forth in Part A controls.

As to TSS, the technology-based standard in Part A is 60 mg/l. However, more stringent limitation for TSS has been adopted by the State of New Jersey through the Interstate Sanitary Commission operating under the Tri-State Compact (N.J.S.A. 32:18-1, *et seq.*). Those stricter limitations are an average discharge concentration of 30 mg/l, and a maximum concentration of 45 mg/l. *Id.* at 221a. These limitations are stated in Part B. Because the water quality-based limitations in Part B are more stringent than the otherwise applicable technology-based TSS limitation in Part A, the limitations in Part B control as a matter of law. See 40 C.F.R. 122.44(d).

Similarly, the State of New Jersey has adopted, through the Interstate Sanitary Commission, water quality-based limitations for BOD in Part B of the permit. Those limitations are an average discharge concentration of 30 mg/l, and a maximum concentration of 45 mg/l. *Id.* In these circumstances, defendant's argument that EPA omitted BOD from Part A of its permit is irrelevant. Whether or not a limitation for BOD is included in Part A of the permit, the limitations in Part B, being more stringent, control. See 40 C.F.R. 122.44(d).

The pre-printed DMR forms, rather than being inconsistent with the permit, instead demonstrate that EPA agrees with the analysis of the permit set forth above. The DMRs set out the most stringent numerical limitations contained in Parts A or B of the permit. Thus, EPA has also concluded that the most stringent numerical limitations in the permit are the legally applicable effluent limitations.

The inconsistencies defendant claims, therefore, are not material disputed facts precluding summary judgment.

Defendants attempt to manufacture disputed facts is an effort to evade the clear procedure envisioned by Congress. As discussed earlier, the FWCPA represents a major departure in water pollution abatement strategy. In the Act, Congress turned away from direct regulation of water quality and established a NPDES as a means to improve water quality indirectly, by regulating effluent levels. This approach was intended to achieve

"swift and direct" enforcement based on "simple numerical standards." See *Student Public Research Group v. Georgia-Pacific Corporation*, slip op. at p. 19 filed Aug. 19, 1985 (D.N.J., J. Brotman) citing *Corn Refiners Association v. Costle*, 594 F.2d 1223, 1226 (8th Cir. 1979). See also 44 Fed. REg. 3263.

"Courts interpreting the Act have been very reluctant to limit the legal effect of permit violations revealed in DMRs. For instance, defendants may not avoid summary judgment as to liability under the Act simply by challenging the accuracy of the data set forth in DMRs." *Georgia Pacific, supra*, citing *SPIRGNJ v. Tenneco Polymers*, 602 F.Supp. 1394, 1400 (D.N.J. 1985); *Chesapeake Bay Foundation v. Bethlehem Steel*, 608 F.Supp. 440, 452 (D.Md. 1985); *Sierra Club v. Simkins Industries, Inc.*, Civ. No. HM 84-4018 et al., slip op. at 14-15 (D. Md. June 18, 1985); *SPIRGNJ v. Fritzsche, Dodge & Olcott*, 579 F.Supp. 1528, 1538-39 (D.N.J. 1984); *aff'd*, 759 F.2d 1131 (1985). But cf. *Friends of the Earth v. Facet Enterprises*, Civ. 84-3577, slip op. t 8 (W.D.N.Y. December 18, 1984).

Because the issue here is whether the DMRs were violated and not the appearance of defendant's facility, I deny defendant's request for a site visit by the court.

SUMMARY JUDGMENT

As stated earlier, summary judgment may only be granted where after all reasonable inferences are drawn in favor of the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

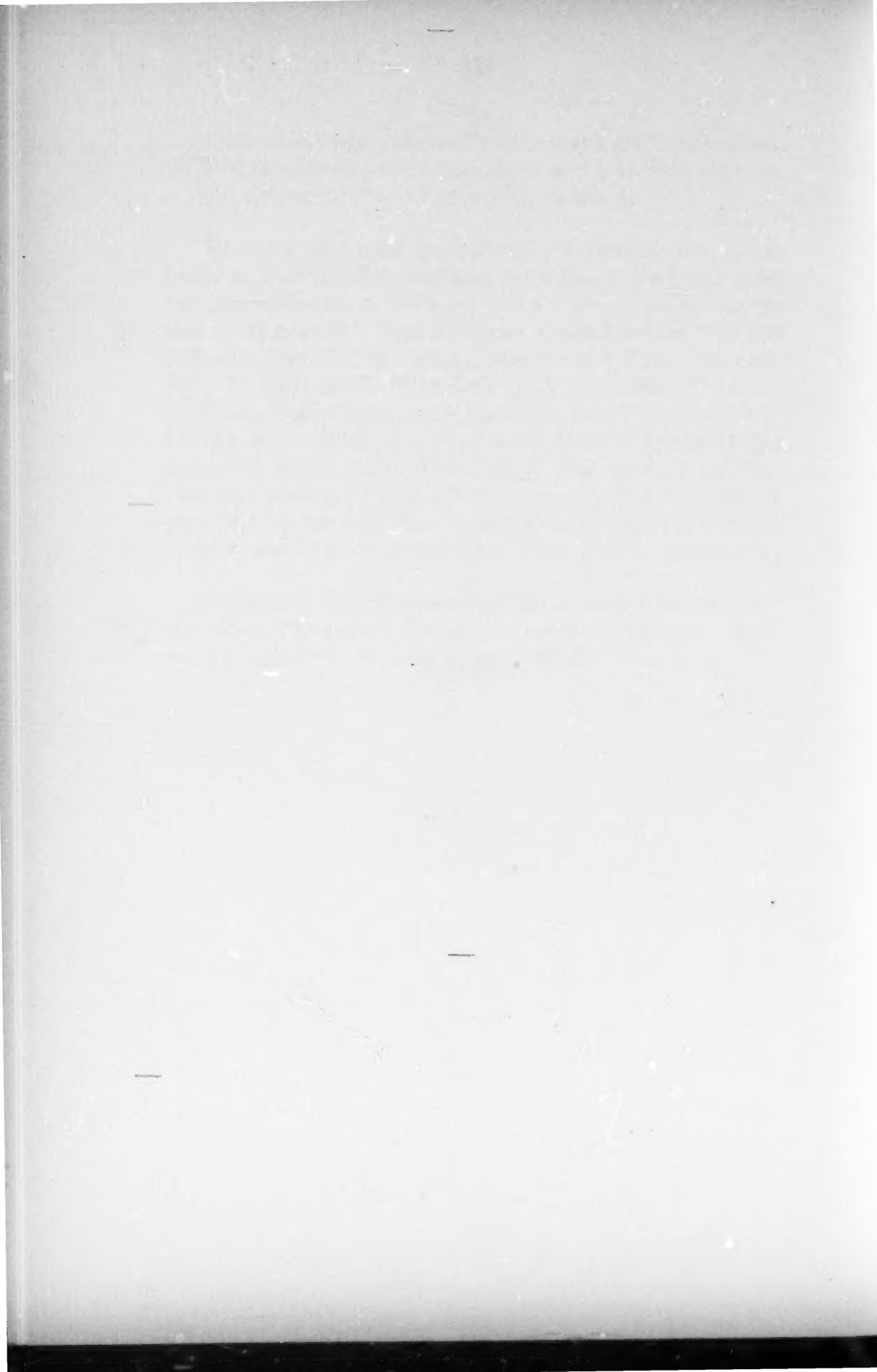
Here, defendant has admitted in official reports that its discharges have exceeded the effluent limitations in its permit. The courts have long approved the use of report or records which the law requires to be kept as admissions in establishing civil liability. See *Garner v. United States*, 424 U.S. 648 (1976); *Shapiro v. United States*, 335 U.S. 1, 17, 35 (1948); *Environment Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 339 (4th Cir. 1983). This rule has been specifically applied to reports required by the FWPCA. See *United States v. Ward*, 448 U.S. 242 (1980).

As discussed earlier, the law is clear that a discharger whose effluent exceeds its permit limitations and who does not have a valid defense to the violation violates the Act.

The courts have held that NPDES enforcement actions are based on strict liability and that defendant's intent and good faith are irrelevant to the issues of statutory violations and the defendant's liability. *United States v. Earth Sciences, Inc.*, 559 F.2d 368, 374 (10th Cir. 1979); *United States v. Frezzo Brothers, Inc.*, 17 ERC 2037, 2043-2044 (E.D. Pa. 1982) (criminal penalties); *United States v. CF Industries, Inc.*, 542 F.Supp. 952, 955 (D. Minn. 1982). See also *United States v. Phelps Dodge Corp.*, 391 F.Supp. 1181, 1187-1188 (D.Ariz. 1975). If a defendant had made good faith efforts to comply, this may only be considered in assessing the amount of the penalty for which it is liable and in determining what other relief is appropriate.

As there is no dispute of material fact concerning defendant's violations of its permit limitations, the court will grant summary judgment as to liability to plaintiffs.

APPENDIX G



**APPENDIX G
ORDER DENYING REHEARING**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 89-5831

**PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY,
INC.
and FRIENDS OF THE EARTH**

V.

POWELL DUFFRYN TERMINALS INC.,

Appellant

**UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY,**

Intervenor

No. 89-5851

**PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY,
INC. and FRIENDS OF THE EARTH,**

Appellants

V.

POWELL DUFFRYN TERMINALS INC.

No. 89-5861

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY,
INC. and FRIENDS OF THE EARTH

V.

POWELL DUFFRYN TERMINALS INC.

WILLIAM B. REILLY, in his capacity as Administrator,
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 84-00340)

Argued May 21, 1990

Before: SCIRICA, NYGAARD and ALDISERT, *Circuit Judges*

SUR PETITION FOR REHEARING

The petition for rehearing filed by Public Interest Research Group of New Jersey, Inc. and Friends of the Earth in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

/s/

Circuit Judge

Dated: October 11, 1990

APPENDIX H



APPENDIX H

§1365. Citizen Suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf --

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced

(1) under subsection (a)(1) of this section --

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a

court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

**(c) Venue; intervention by Administrator;
United States interests protected;**

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or

substantially prevailing party, whenever the court determines such award is appropriate. The Court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.

(g) Citizen

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.



APPENDIX I



APPENDIX I COMPLAINT

Michael Gordon
25 Valley Road
Montclair, NJ 07042
(201) 736-0094

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

STUDENT PUBLIC INTEREST :
RESEARCH GROUP OF N.J., INC. :
204 West State Street :
Trenton, NJ 08608 :

and :

FRIENDS OF THE EARTH :
1045 Sansome Street :
San Francisco, CA 94111 :

Plaintiffs, :

v. :

P.D. OIL & CHEMICAL STORAGE, :
INC., :
Constable Hook Road, :
P.O. Box 283 :
Bayonne, NJ 07002 :

Defendant. :

Civil No.
84-340A

COMPLAINT INTRODUCTION

1. This action is a citizen's suit, brought under Section 505 of the Federal Water Pollution Act ("the Act"), as amended, 33 U.S.C. 1365. Plaintiffs seek a declaratory judgment, injunctive relief, the imposition of civil penalties and the award of costs, including attorneys' and expert witness' fees, for the defendant's repeated violations of the terms and conditions of its National Pollutant Discharge Elimination System/New Jersey Pollutant

Discharge Elimination System (NPDES/NJPDES) permit number NJ 000 3361 in violation of Section 301(a) of the Act, 33 U.S.C. 1311(a).

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction under Section 505(a) of the Act, 33 U.S.C. 1365(a).

3. On March 16, 1983, the plaintiffs gave notice of the violations and their intent to file suit to the Administrator of the United States Environmental Protection Agency ("EPA"), to the New Jersey Department of Environmental Protection, and to the defendant, as required by Section 505(b)(1)(A) of the Act, 33 U.S.C. 1365 (b)(1)(A). A copy of the notice is attached as Appendix A.

4. More than sixty days have passed since notice was served and neither EPA nor the New Jersey Department of Environmental Protection has commenced and is diligently prosecuting a civil or criminal action to redress the violations.

5. Venue is appropriate in the District of New Jersey pursuant to Section 505(c)(1) of the Act, 33 U.S.C. 1365(c)(1), because the source of the violations complained of is located within this District.

PARTIES

Plaintiffs

6. Plaintiff Student Public Interest Research Group of New Jersey, Inc. ("NJPIRG") sues on behalf of both itself and its members. NJPIRG is a non-profit corporation organized under the laws of the State of New Jersey, with its principal place of business in Trenton, New Jersey. NJPIRG is a state-wide organization with over 20,000 members, dedicated among other things, to protecting and improving the quality of water in New Jersey. To this end, in 1973, NJPIRG and its affiliate the New Jersey Public Interest Research Foundation established the Clean Water Action Project (later shortened to NJPIRG's Water Project). NJPIRG's Water Project is committed to preventing the

further degradation of New Jersey's streams, lakes and rivers and to improving the quality of the water in one of the most industrialized and polluted states in our nation.

7. Members of NJPIRG reside in the vicinity of, or own property or recreate in, on or near the portions of the Kill Van Kull and Upper and Lower New York Bay that are affected by the defendant's discharge of pollutants pursuant to NPDES/NJPDES permit number NJ 000 3361. The quality of the waters of the States of New Jersey and New York, especially the portions of the Kill Van Kull and Upper and Lower New York Bay affected by the defendant's discharge, directly affects the health, economic, recreational, aesthetic and environmental interests and well-being of NJPIRG's members. The interests of NJPIRG's members have been, are being and will be adversely affected by the defendant's violation of terms and conditions of NPDES/NJPDES permit number NJ 000 3361.

8. Plaintiff Friends of the Earth (FOE) sues on behalf of both itself and its members. FOE is a not-for-profit corporation organized under the laws of the State of New York, with its principal place of business in San Francisco, California. FOE is a membership organization with approximately 32,000 active members residing in all states of the United States. FOE has over 2,300 members in New Jersey and 8,000 members in New York. FOE is dedicated to the protection and enhancement of the natural resources of this country including our air, water and land. FOE's members are greatly concerned about water quality and FOE has a long history of involvement in clean water activities on both the local and national levels.

9. Members of FOE reside in the vicinity of, or own property or recreate in, on or near the portions of the Kill Van Kull and Upper and Lower New York Bay that are affected by the defendant's discharge of pollutants pursuant to NPDES/NJPDES permit number NJ 000 3361. The quality of the waters of the States of New Jersey and New York, especially the portions of the Kill Van Kull and Upper and Lower New York Bay affected by the defendant's discharge, directly affects the health, economic,

recreational, aesthetic and environmental interests and well-being of FOE's members. The interest of FOE's members have been, are being and will be adversely affected by the defendant's violation of the terms and conditions of NPDES/NJPDES permit number NJ 000 3361.

10. Defendant P. D. Oil & Chemical Storage, Inc. is a corporation organized under the laws of the State of New Jersey. Defendant operates a facility for the storage and wholesale distribution of bulk chemicals in Bayonne, New Jersey. Defendant acquired all stock in this facility from the El Dorado Terminals Corporation in the second half of 1977. Subsequent to that time, defendant changed the name of the facility from El Dorado Terminals Corporation to P. D. Oil & Chemical Storage, Inc.

FACTS

11. The Administrator of EPA, pursuant to Section 402(a) of the Federal Water Pollution Control Act, 33 U.S.C. 1342(a), issued NPDES permit number NJ 000 3361 to the defendant's predecessor in interest, Ed Dorado Terminals Corporation, on May 30, 1974, authorizing the defendant to discharge limited quantities of pollutants from the facility for the storage and wholesale distribution of bulk chemicals into the Kill Van Kull through Outfall 001. This permit was renewed and reissued by the Administrator on March 2, 1981. The Kill Van Kull is a navigable water of the United States.

12. The Administrator of EPA authorized the New Jersey Department of Environmental Protection, pursuant to Section 402(a)-(b) of the Act, 33 U.S.C. 1342(a)-(b), to issue NPDES/NJPDES permits on April 13, 1982. The applicable New Jersey law is the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1, *et seq.*

13. Pursuant to the Administrator's delegation of authority and Section 58:10a-6 of the New Jersey Water Pollution Control Act, the New Jersey Department of Environmental Protection converted defendant's NPDES permit number NJ 000 3361

to NPDES/NJPDES permit number NJ 000 3361. The defendant, pursuant to NPDES/NJPDES permit number NJ 000 3361, is authorized to discharge limited quantities of pollutants into the Kill Van Kull.

14. Section 308 of the Act, 33 U.S.C. 1318, requires NPDES/NJPDES permittees to establish and maintain records, install, use and maintain monitoring equipment, sample effluents, and report on a regular basis to the permit-issuing agency regarding the facility's discharge of pollutants. The reports consist of Discharge Monitoring Reports (DMRs) and Noncompliance Reports (NCRs).

15. Defendant has submitted DMRs and NCRs since august 1977. Appendix A, Plaintiffs' Notice of Intent to Sue, contains a list of numerous violations of the permit limitations for Out-fall 001 which were taken directly from the NCRs and DMRs submitted by the defendant pursuant to the reporting requirements established by Federal and state law. That list is incorporated herein by reference.

16. Defendant's violations of the Act have been numerous and repeated. In general, over the 58 month period covered by Appendix A, the defendant violated its permit limitations for petroleum hydrocarbons, total organic carbon, chromium, chlorinated hydrocarbons, pH, biological oxygen demand, total suspended solids, and oil and grease, over 45 times. Defendant has violated its permit limitations subsequent to the violations listed in Appendix A. On information and belief, plaintiff alleges that defendant continues to be in violation of the Act.

17. Because of this extensive history of violations of the effluent standards and limitation imposed by NPDES/NJPDES permit number NJ 000 3361, the plaintiffs believe and allege that, without the imposition of appropriate civil penalties and issuance of an injunction, defendant P. D. Oil & Chemical Storage, Inc. will continue to violate its NPDES/NJPDES permit to the further injury of the plaintiffs and others.

CLAIMS

18. Section 301(a) of the Federal Water Pollution Control Act, 33 U.S.C. 1311(a), prohibits the discharge of pollutants from a

point source into navigable waters of the United States, unless in compliance with various enumerated sections of the Act. Section 301(a) prohibits, *inter alia*, such discharges not authorized by, or in violation of, the terms of an NPDES/NJPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. 1342.

19. Defendant's wastewater discharges identified in Appendix A are discharges from a point source into navigable waters of the United States within the meaning of Section 301 of the Act, 33 U.S.C 1311.

20. Defendant's wastewater discharges from Outfall 001 as listed in Appendix A to this Complaint and those which have been committed subsequent to those listed in Appendix A are violations of its permit limitations for the pollutants listed in paragraph 16 above. These violations of the permit limitations violate sections 301(a) and 402 of the Act, 33 U.S.C. 1311(a) and 1342.

RELIEF

Wherefore, the plaintiffs respectfully request this Court to grant the following relief:

A. Issue a declaratory judgment that defendant P. D. Oil & Chemical Storage, Inc. has violated, and continues to be in violation of, Sections 301 and 402 of the Federal Water Pollution Control Act, 33 U.S.C. 1311 and 1342;

B. Enjoin the defendant from operating its facility for the storage and wholesale distribution of bulk chemicals in Bayonne, New Jersey in such a manner as will result in the further violation of the defendant's NPDES/NJPDES permit number NJ 000 3361.

C. Authorize the plaintiffs, for the period beginning on the date of the court's order and running for one year after the defendant achieves compliance with all of the limitations in its NPDES/NJPDES permit, to sample or to arrange sampling of any discharge of pollutants from the defendant's facility with the cost of the sampling to be borne by the defendant;

D. Order the defendant to provide the plaintiffs for the period beginning on the date of the Court's order and running for one

year after the defendant achieves compliance with all of the limitations of its NPDES/NJPDES permit, with a copy of all reports and other documents which the defendant submits to the Federal or state government regarding the defendant's NPDES/NJPDES permit at the time it is submitted to these authorities.;

E. Order the defendant to pay civil penalties of \$10,000 per day of violation for each violation pursuant to Sections 309(d) and 505(a) of the act, 33 U.S.C. 1319(d) and 1365(a), including those listed in Appendix A and violations committed subsequent to those listed in Appendix A;

F. Award the plaintiffs their costs, including reasonable attorneys' and expert witness' fees, as authorized by Section 505(d) of the Act, 33 U.S.C. 1365(d); and

G. Award such other relief as this Court deems appropriate.

Respectfully submitted,

/s/ Michael Gordon
MICHAEL GORDON
25 Valley Road
Montclair, New Jersey 07042
(201) 744-7118

/s/ James M. Hecker
BRUCE J. TERRIS
CAROLYN A. SMITH
JAMES M. HECKER
Terris & Sutherland
1121 12th Street, N.W.
Washington, D.C. 20005
(202) 682-2100

Counsel for Plaintiffs

January 27, 1984



APPENDIX J



**APPENDIX J
EXCERPTS OF PLAINTIFFS' RESPONSE
TO DEFENDANTS' INTERROGATORIES**

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

STUDENT PUBLIC INTEREST RESEARCH GROUP OF N.J., Inc., et al.,	:	
	:	HON. HAROLD A. ACKERMAN
Plaintiffs,	:	
	:	Civil No.
v.	:	84-340 A
P.D. OIL & CHEMICAL STORAGE, INC.,	:	
	:	
Defendants.		

**PLAINTIFFS' RESPONSE TO
DEFENDANT'S INTERROGATORIES**

Plaintiffs Student Public Interest Research Group of New Jersey, Inc. (NJPIRG) and Friends of the Earth (FOE) hereby respond to defendant's interrogatories.

Interrogatory 3. With regard to paragraph #7 of the complaint:

(f) Set forth with particularity the environmental injury, if any, which you alleged has resulted from "defendant's discharge of pollutants" (as referred to by you in paragraph #7 of the complaint).

(i) Do you have any factual information and/or expert reports on the issue of whether "defendant's discharge of

pollutants" has affected the water quality and/or the ecosystem of the Kill Van Kull, Lower New York Bay and/or Upper New York Bay?

(ii) If so, set forth that factual information with particularity and attach copies of all expert reports and/or other expert documentation relating thereto.

Answer: (f) See response to Interrogatory 3(d)

(i) At the present time, plaintiffs do not have any factual information and/or expert reports regarding the effect of defendant's discharge of pollutants on the water quality and/or the ecosystem of the Kill Van Kull, Lower New York Bay, and Upper New York Bay.

(ii) Not applicable.

* * *

Interrogatory 17. Which members of NJPIRG were consulted by you regarding adverse impacts if any on their interests resulting from defendant's discharges, prior to your instituting this suit? On what date(s) did such consultation occur? In what form did such consultations occur (writing, oral, telephone, etc.)?

(a) Prior to your instituting this suit did any individual member of NJPIRG review the allegations of paragraph #7 of the complaint and indicate that those allegations were true as to him or her (and their interests)? If so, when; in what form (writing, oral, telephone, etc.); who was present when this communication occurred? What was the sum and substance of what was said? Identify each such individual member of NJPIRG.

Answer: No members of NJPIRG were consulted regarding the adverse impacts of defendants' discharges prior to the institution of this suit.

(a) Carolyn A. Smith read a draft of the allegations in paragraph 7 of the complaint to Edward Lloyd, NJPIRG's

counsel, over the telephone between March and May 1983. Mr. Lloyd approved these allegations. Mr. Lloyd's address is 111 Montgomery Street, Trenton, N.J., 08611; his phone number is (609) 392-8350.

Interrogatory 18. Which members of "F.O.E." were consulted by you, regarding the adverse impacts if any on their interests resulting from defendant's discharges, prior to your instituting this suit? On what date(s) did such consultations occur? In what form did such consultations occur (writing, oral, telephone, etc.)?

(a) Prior to your instituting this suit did any individual member of "F.O.E." review the allegations of paragraph #9 of the complaint and indicate that those allegations were true as to him or her (and their interests)? If so, when; in what form (writing, oral, telephone, etc.); who was present when this communication occurred? What was the sum and substance of what was said? Identify each such individual member of "F.O.E."

Answer: No members of F.O.E. were consulted regarding the adverse impacts of defendants' discharges prior to the institution of this suit.

(a) Carolyn A. Smith read a draft of the allegations in paragraph 9 of the complaint to Elizabeth Raisbeck, Director of FOE's Washington Office.

Ms. Raisbeck's address is Friends of the Earth, 530 7th Street, S.E., Washington D.C. 20003; her phone number is (202) 543-4312.

APPENDIX K



APPENDIX K
EXCERPTS FROM AFFIDAVIT OF LEROY SULLIVAN

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

STUDENT PUBLIC INTEREST RESEARCH GROUP OF N.J., Inc., et al.,	:	
	:	HON. HAROLD A. ACKERMAN
Plaintiffs,	:	
	:	
v.	:	Civil No. 84-340A
P.D. OIL & CHEMICAL STORAGE, INC.,	:	
	:	
Defendant.		

AFFIDAVIT OF LEROY E. SULLIVAN, P.E.

I. LeRoy E. Sullivan, hereby affirm and state:

1. I am a professional engineer licensed to practice in the States of New Jersey, New York and Maryland. I have a Bachelor of Science degree in Civil Engineering from the New Jersey Institute of Technology (1971), and a Master of Science degree in Environmental Engineering from Rutgers University (1972). I am President of the Sullivan Engineering Group Inc.

I have been requested to consult with Powel Duffryn Terminals, Inc. regarding technical questions relating to the impacts, if any, of its operations including its outfall discharges to the Kill Van Kull, to land uses along the Kill Van Kull including the Kill Van Kull Park, and to the New York Bays including both the Upper and Lower New York Bays and land uses at and about South Beach. Prior to being engaged by P.D. concerning these matters I consulted with Powell Duffryn

for a number of years regarding various environmental compliance matters and in that capacity I have become familiar with P.D.'s construction and upgrading program since 1977.

I have evaluated the nature of Powell Duffryn's discharges under its NJPDES permit and the impacts, if any, of that out-fall in the areas described above. In my opinion for the reasons stated below, it is a reasonable scientific certainty that P.D.'s operations do not adversely affect water quality in the Kill Van Kull at or about the Kill Van Kull Park, or water quality at or about South Beach. It is also my opinion that P.D.'s operations do not adversely affect water quality in the Kill at any other location except perhaps in some purely speculative and theoretical way.

2. In addition to my work with Powell Duffryn I am regularly involved with the Sullivan Engineering Group in projects concerning industrial compliance with environmental regulations including matters relating to water quality, water pollution control, air pollution control and hazardous waste management. These are the areas of my professional specialty and I have engaged in such matters throughout the United States and in Canada.

* * *

22. The Kill Van Kull Park is approximately 1.8 miles to the west of the Powell Duffryn site, and South Beach is several miles or more to the southeast from Powell Duffryn's discharge.

23. Further, many of the land uses along the Arthur Kill, Newark Bay, Passaic and Hackensack Rivers, East River, and to some extent the Hudson River, and New York Bay are intensely industrialized with runoff and numerous discharges regularly and continuously entering into these bodies of water, which due to the tides flow past the Kill Van Kull Park.

24. In view of these facts and the intermittent and limited nature of Powell Duffryn's discharge; the relatively small flow contributions of that discharge; the flow rates and changing tides of the Kill Van Kull; the volumes of water in the Kill Van Kull;

estuary hydraulics including such things as dilution and tidal motions; intervening outfalls such as from the Bayonne Sewage Treatment Plant and the Port Richmond Sewage Treatment Plant; the minute constituents of Powell Duffryn's discharge; and the distances between Powell Duffryn and the Park and the South Beach area, it is a reasonable scientific certainty that Powell Duffryn's discharge does not affect water quality at or about the Kill Van Kull Park or South Beach and the area south of South Beach.

. . .

26. . . . it is clear and a reasonable scientific certainty that Powell Duffryn's discharge does not affect water quality at or about the park or South Beach. The conditions complained of by the plaintiffs (e.g., smells, discoloration, and the like) are caused by sources other than Powell Duffryn.

In fact the affidavits submitted by plaintiffs described the polluted conditions at these locations. The water conditions described include various color problems where the water is said to be black; as having green sludge floating on top; black with beige foam; black-green turbid brownish; as having dead fish, and oil and garbage floating on it; also there are complaints of odors coming from the water. These conditions are not typically related to or associated with the type, intermittent and/or relatively small discharges associated with Powell Duffryn's operations. They do not derive from the constituents of P.D.'s discharge; P.D. is not the source. The relatively small rainfall discharges associated with Powell Duffryn's operations do not result in the type of impacts described in the affidavits.

To the contrary these conditions which plaintiffs' members have observed are typical of sewage effluent and stormwater runoff, both of which occur in massive volumes quite near the park.

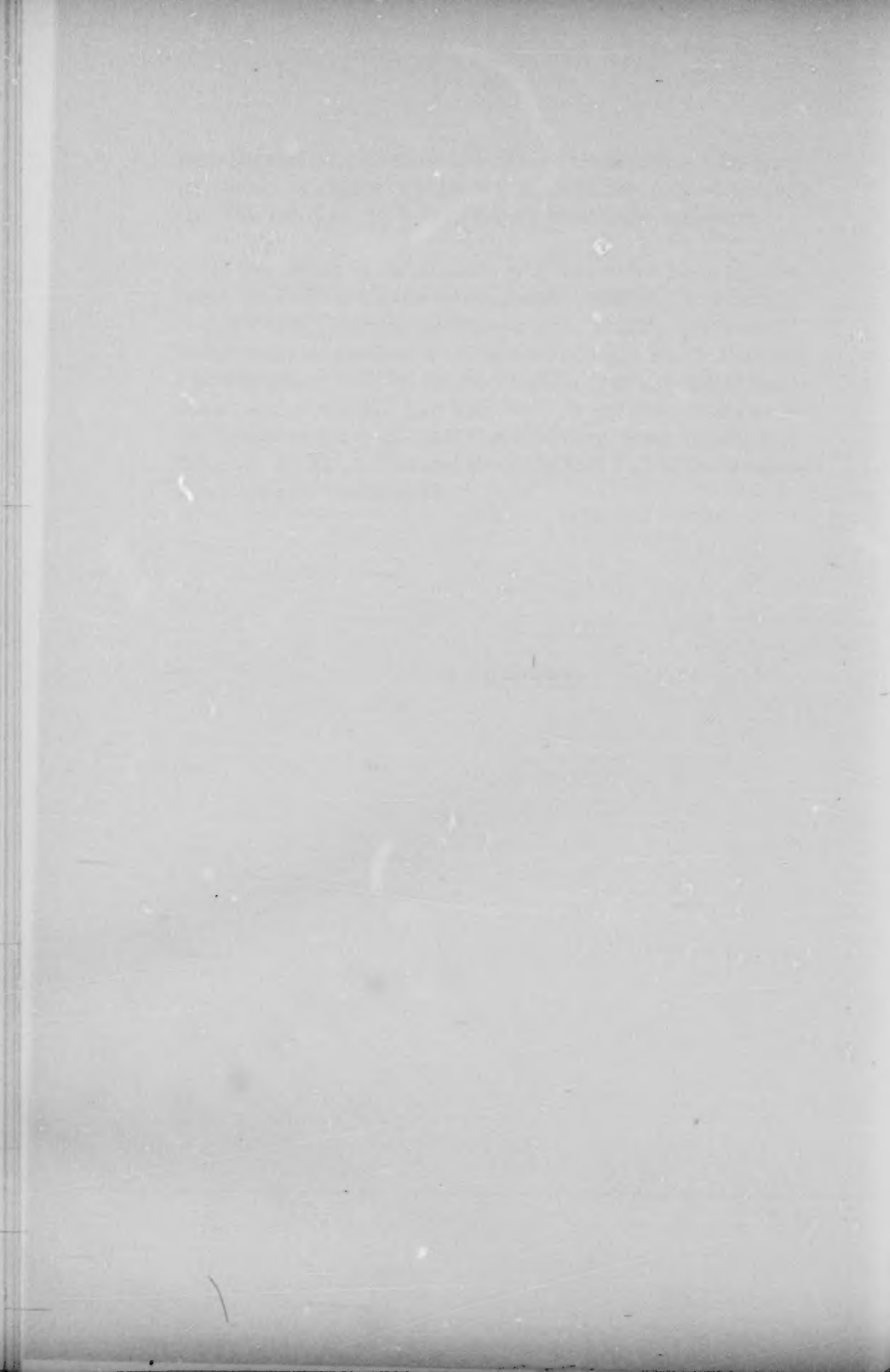
27. Further, when one considers Powell Duffryn's discharge, it is rainfall that is the source and essential constituent of that discharge with some small amounts of other materials being

incorporated into the rainwater. Powell Duffryn is not discharging sludge, oil, black or beige foams, dead fish, or garbage into the Kill Van Kull. It is discharging essentially rainwater.

In view of all of the above it is a reasonable scientific certainty that P.D. is not the cause of these conditions and further, that if Powell Duffryn's discharges were entirely eliminated it would make no qualitative difference to the Kill Van Kull and/or the areas about which plaintiffs complain, that is, south of South Beach and/or the Kill Van Kull Park. In my opinion if Powell Duffryn were not to discharge another drop, water quality conditions in the Kill, and at and about the park and/or South Beach would remain unchanged.

* * *

APPENDIX L



APPENDIX L
EXCERPTS FROM AFFIDAVIT OF ALLEN J. DRESDNER

**UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF NEW JERSEY**

STUDENT PUBLIC INTEREST RESEARCH GROUP OF N.J., INC., et al.,	:	
	:	HON. HAROLD A. ACKERMAN
Plaintiffs,	:	
	:	Civil No.
v.	:	84-340 A
P.D. OIL & CHEMICAL STORAGE, INC.,	:	
	:	
Defendants.	:	

AFFIDAVIT OF ALLEN J. DRESDNER

I, Allen J. Dresdner, do hereby affirm and state:

1. I am a licensed Professional Planner of the State of New Jersey and President of Dresdner Associates, a New Jersey Corporation engaged in the practice of land use and environmental planning in this state and throughout the United States. Dresdner Associates has been asked to serve as an expert consultant by Powell Duffryn Terminals, Inc. with regard to this matter. This affidavit is submitted at the request of Powell Duffryn's counsel and in support of defendant's motions presently pending before the Court and in opposition to plaintiffs' motion for summary judgment.

. . .

22. Powell Duffryn is itself located on the Bayonne shoreline of the Kill Van Kull towards the Kill's eastern end. I have

inspected the facility on numerous occasions and have observed the Kill as it flows by Powell Duffryn and to the west of Powell Duffryn as well. The waters there do not exhibit the discoloration and smell which are referred to by the plaintiffs and it is clear both as a professional planner and based on my personal observations that the sources of that pollution at and about the Park are downstream of Powell Duffryn. In my opinion the *sources* are the Bayonne Sewage Treatment Plant, the Port Richmond Sewage Treatment Plant, the proximate rotting wharf/pier/barges, and litter discharged into the Kill Van Kull from the numerous storm drains from both Staten Island and Bayonne which are located along the shores of the Kill Van Kull to the west of Powell Duffryn, and heavy industrial uses which are proximate to the Park. See paragraph #24 and 28, below.

23. It further should be added that the Atlas Marina located near the park and as shown on the map mentioned above has no sanitary sewage facilities and is a source of waste emitted directly into the Kill.

24. I have read the depositions of the individuals relied on by the plaintiffs including Messrs. Abrams and Gerbino, Dr. McNeil, Ms. Cummins, and the others. They refer among other things to garbage floating on the Kill Van Kull near the park as well as certain "greasy" water conditions. Based on my personal observations of the Kill on several occasions and my knowledge of the sources of those types of conditions, it is my professional opinion that they do not originate from Powell Duffryn nor are they related to Powell Duffryn's discharges. They are the types of pollution which typically and regularly are known to emanate from sewage treatment plants and storm water outfalls and which form a standard part of the analysis as to land use relationships in my field. We regularly encounter these types of pollutants in waterways and are required to assess their sources and the impacts that they cause in the siting of other land uses. There is no question in my mind that the sources of the pollution complained of by the plaintiffs relating to the park are these neighboring sewage treatment outfalls, the storm water outfalls and marine traffic near the park. The types of

pollution noted by these individuals are typical to sewage outfalls, stormwater outfalls and marine spills. I come to this conclusion based on my observations of the Kill Van Kull and on twenty five years of experience dealing directly with these types of evaluative problems and issues as a land use planner.

It is a standard procedure and requirement in our field to evaluate such sources of pollution and such land uses and their relationships with other siting questions.

25. It also is reported by plaintiffs that their members are adversely affected at South Beach and below (or south) of South Beach along the Lower New York bay. There is no land use connection between Powell Duffryn's operations and that area which plaintiffs indicate. It is more than ten miles away according to the plaintiffs and my own observations indicate that these areas are approximately five to six miles away, or more, depending upon where the recreational activities occur. As plaintiffs complain about similar pollution problems pertaining to discoloration and garbage, smell, etc. in Lower New York Bay, those pollution problems emanate from the land uses in the southern part of New York City and the Hudson River where there are hundreds of outfalls putting sewage and garbage into the river in a direct line with the Lower New York Bay.

26. In fact, there is no sewage treatment facility along the entire west shoreline of Manhattan. This means when approximately one half of Manhattan flushes its toilet, the effluent goes into the Hudson River with no treatment and that material flows down the Hudson through the Upper New York Bay and into the Lower New York Bay in the areas which form the site of plaintiff's concern. As a land use planner, these are the typical land use sources of the garbage, smells, discoloration and sewage types of problems which form the base for the plaintiff's concerns. Powell Duffryn is not such a land use.

27. In this regard, One of the standard matters which a land use planner is required to evaluate is the relationship among land uses to determine how one land use effects the use and enjoyment of another land use. There is a nexus among land uses

so that as a regular and standard planning and siting procedure, land use planners assess those impacts and make determinations and form plans regarding them.

28. Based upon my personal observations and my study of the land use patterns and historical patterns of development in the Kill Van Kull, it is my opinion that the land uses which dominate and control the quality of the waters in the Kill Van Kull, air quality, and the overall environmental ambiance at and about the park are industrial marine traffic transiting the Kill by the park, the refineries to the west of the park with their air emissions, the visual impact of such industrial development adjacent to the park, the sewage outfalls, nearby point and non-point sources of storm water runoff, and the neighboring industrial uses such as Rollins Terminals and Standard Tank Cleaning. With Powell Duffryn being nearly two miles away and in no contact with the Park or its users, it does not impact on the use and enjoyment of the park.

29. One final point should be added. There is reference in certain of the affidavits to property values in Staten Island several miles away being affected by Powell Duffryn's operations. The value of those properties are effected by the quality and character of the surrounding neighborhoods, nearby traffic conditions, the proximity of community facilities, housing conditions, tax rates, etc. The locale of the Kill Van Kull several miles away is not related to those property values.

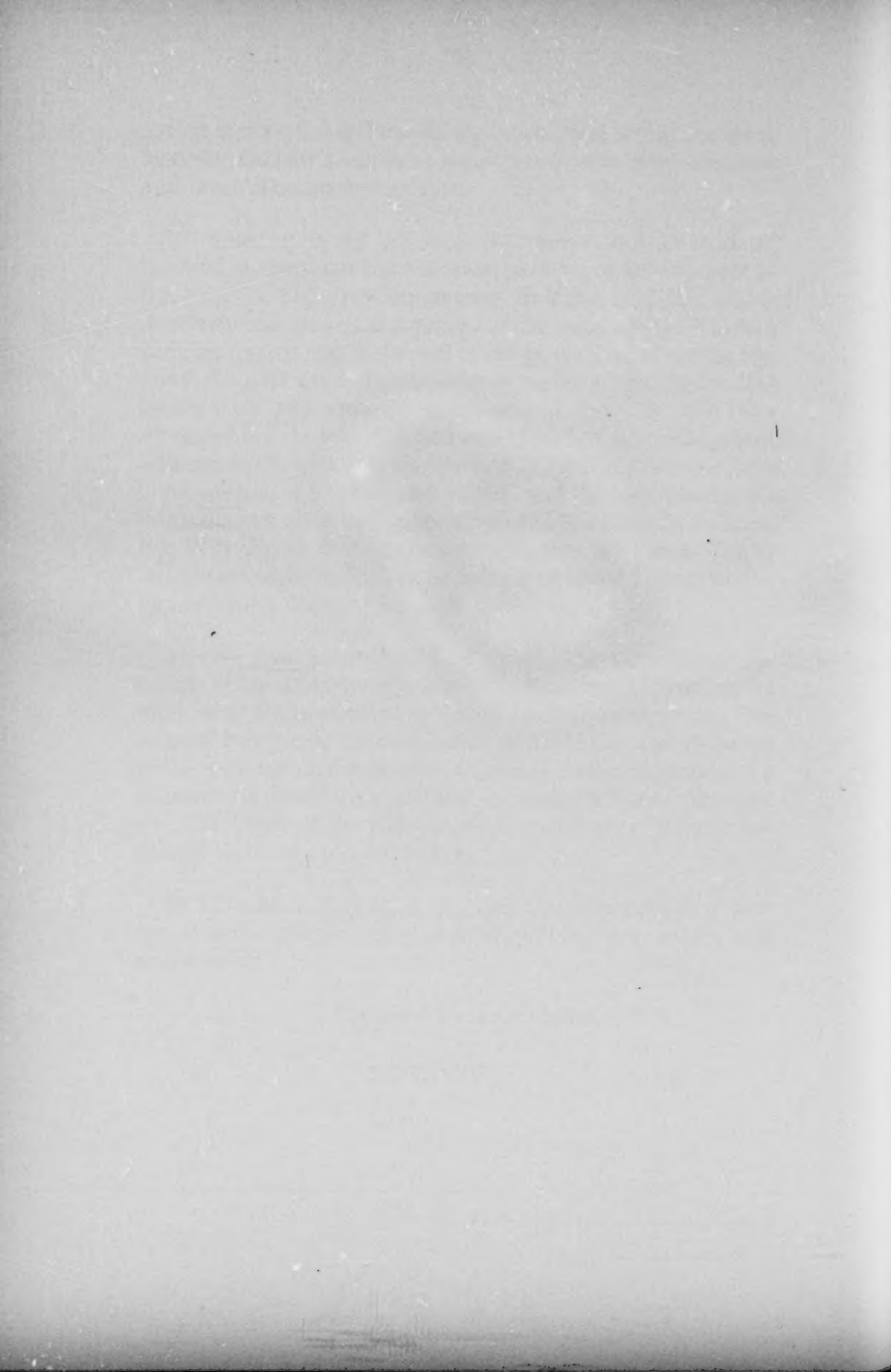
30. Pursuant to 28 USC 1746, I declare under penalty of perjury that the foregoing factual statements made by me are true and correct.

Executed on November 6, 1984

Signature

/s/

APPENDIX M



APPENDIX M

EXCERPTS FROM AFFIDAVIT OF
RONALD R. SPRAGUE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STUDENT PUBLIC INTEREST	:	
RESEARCH GROUP OF N.J.,	:	HON. HAROLD
Inc., et al.,	:	ACKERMAN
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL NO.
P.D. OIL & CHEMICAL STORAGE,	:	84-340A
INC.,	:	
	:	
Defendant.	:	

AFFIDAVIT OF RONALD R. SPRAGUE

Ronald R. Sprague hereby affirms and states:

1. I am employed by Powell Duffryn Terminals, Inc. ("P.D.") as corporate secretary. My primary duties and responsibilities include among other things coordinating P.D.'s activities and policies concerning environmental compliance. In this regard since Powell Duffryn acquired the El Dorado site in 1977 I have been involved in P.D.'s efforts to upgrade, improve and expand the facility. I am personally familiar with its acquisition of the subject NJPDES permit and its activities thereunder.

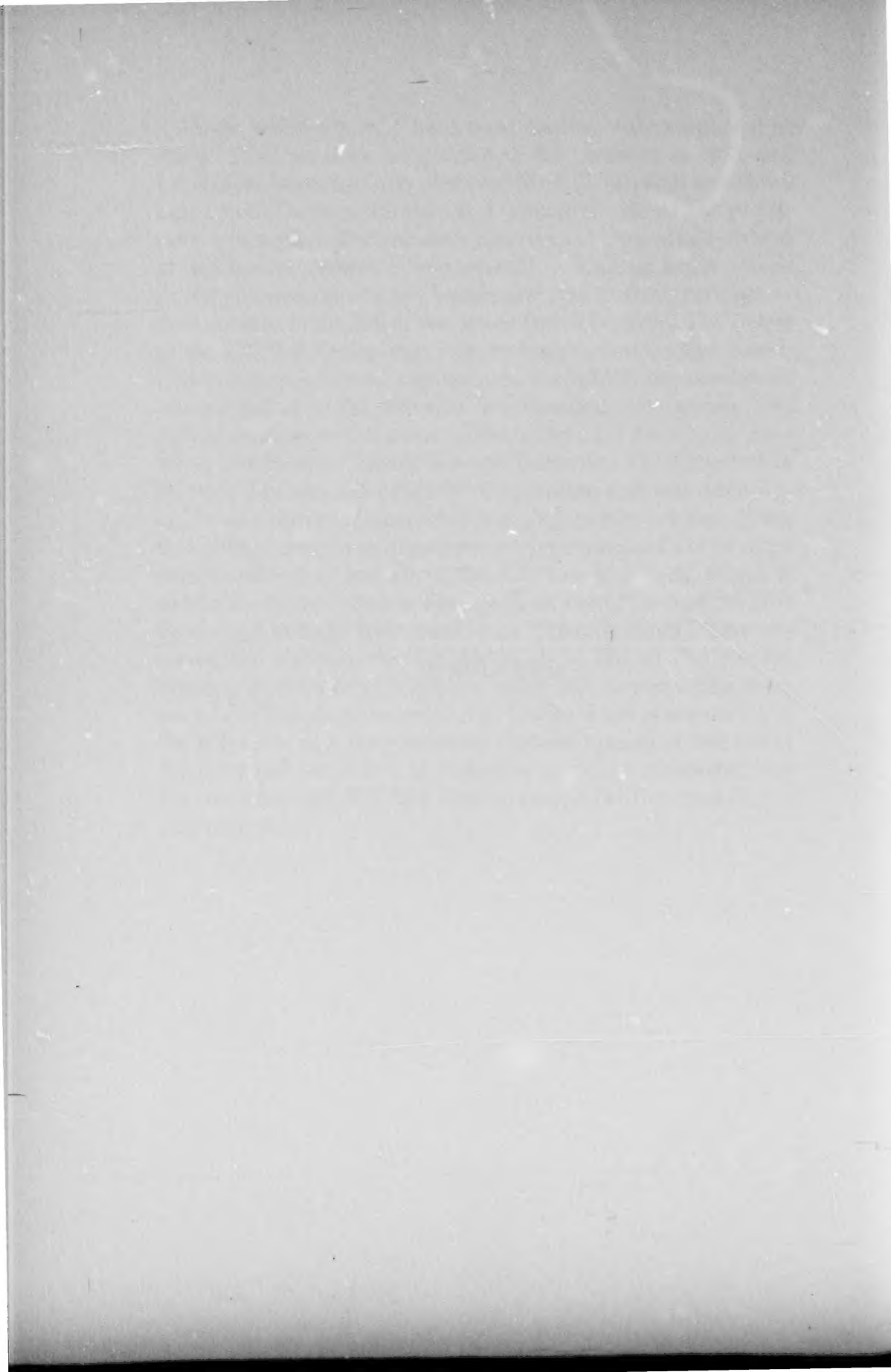
2. I have prepared this affidavit at counsel's request and it is submitted respectfully in support of Powell Duffryn's present motion and in opposition to plaintiffs' motion for summary judgment.

* * *

15. As noted above, I have been continuously employed at Powell Duffryn since acquisition of the premises in 1977 and I therefore have regularly observed the Kill Van Kull as it flows past Powell Duffryn, on ebbs and flows of the tides. The conditions which plaintiffs' members described in their affidavits and at depositions (where I was present) — such as water which smells and discoloration of waters and free floating garbage — does not exist in the Kill at and about Powell Duffryn. The waters of the Kill Van Kull as they flow in both directions past Powell Duffryn generally and regularly do not exhibit the conditions complained of by the plaintiffs. See Attached photographs. The only exceptions to this observation, of which I am aware, were when the Passaic County Sewage Treatment Plant located in Newark Bay was not properly in operation and was discharging large volumes of untreated sewage into Newark Bay. From that sewage treatment plant's discharges came smells of the type complained of at and about the Kill Van Kull Park, which is proximate to the Bayonne Sewage Treatment Plan and the Port Richmond Sewage Treatment Plan. The only times I have observed the water in the Kill Van Kull by Powell Duffryn exhibiting discoloration are when there are discrete spills from some land based source or marine traffic. Thus observations of the Kill show that the conditions that are present at and about the park and the source of plaintiffs' members complaints are not present in the Kill Van Kull by Powell Duffryn and do not originate there.

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APPENDIX N



In

APPENDIX N

Partial List of Section 505 Cases

Alabama

Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., No. CV87-G-1390, N.D. Ala.

Arkansas

Steve Work, *et al.* v. Tyson Foods, Inc., *et al.*, No. 87-2034, E.D. Ark.

California

Sierra Club v. Shell Oil Company, No. C-84-3432, N.D. Cal.

Sierra Club v. Tosco Corporation, No. C-84-3434, N.D. Cal.

Sierra Club v. Union Oil Company of California and Pacific Gas and Electric Company, No. 84-3435, N.D. Cal.

Sierra Club v. Pacific Gas and Electric Company, No. 84-4042, N.D. Cal.

Sierra Club v. Chevron U.S.A. Inc., No. 85-1851, C.D. Cal.

Connecticut

Connecticut Fund for the Environment and Natural Resources Defense Council, Inc. v. Job Plating Company, No. H83-963, D. Conn.

Connecticut Fund for the Environment and Natural Resources Defense Council, Inc. v. Marlin Firearms Company, No. H-83-964, D. Conn.

Connecticut Fund for the Environment and Natural Resources Defense Council, Inc. v. Robertshaw Controls Company, No. H-83-965, D. Conn.

Connecticut Fund for the Environment and Natural Resources Defense Council, Inc. v. Eyelet Specialty Company, No. 83-966, D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Diventco Corporation,, No. H-83-968,
D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Beaton & Corbin Manufacturing, Inc.,
No. H-83-969., D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Risdon Manufacturing Co. I, No.
H-83-993, D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Risdon Manufacturing Co. II, No.
H-83-994, D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Raymark Industries, No. 83-1081, D.
Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. L&W Industries, No. H-83-1082, D.
Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Chesebrough-Pond's, Inc., No. 84-255,
D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Union Manufacturing Company, No.
N-84-307WWE, D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Chromium Process Company, No.
84-311, D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. AVCO Corporation, No. 84-441, D.
Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Contract Plating Company, Inc., No.
H84-487, D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Gould, Inc., No. H-84-489, D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Stewart-Warner Corp. Bassick Division,
No. H-84-490, D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Harper-Leader, Inc., No. H-84-450, D.
Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Carpenter Technology Corporation, No.
B-84-521, D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Light Metals Coloring Company, Inc.,
No. 84-771, D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Bridgeport Brass Company, No. 84-955,
D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Yardney Electric Corporation, No.
H-85-118, D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Pfizer, No. H85-86, D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. Summit Coporation, No. H85-5-JAC,
D. Conn.

Connecticut Fund for the Environment and Natural Resources
Defense Council, Inc. v. General Electric Company, No.
H84-1326, D. Conn.

Connecticut Fund for the Environment and Natural Resources Defense Council, Inc. v. Superior Electric Company, No. H85-6-JAC, D. Conn.

Connecticut Fund for the Environment and Natural Resources Defense Council, Inc. v. Colonial Bronze Company, No. 83-967-JAC, D. Conn.

Connecticut Fund for the Environment and Natural Resources Defense Council, Inc. v. Philson, Inc., No. H85-225, D. Conn.

Connecticut Fund for the Environment and Natural Resources Defense Council, Inc. v. The Upjohn Company, No. N-85-349, D. Conn.

District of Columbia

Save Our Cumberland Mountains, Inc., et al. v. Donald P. Hodel, Secretary of Interior, et al., No. 85-5984, D.C. Cir.

Delaware

Natural Resources Defense Council, Inc. and Delaware Audubon Society v. Occidental Chemical Corporation, No. 89-71, D. Del.

Natural Resources Defense Council, Inc. and Delaware Audubon Society v. Texaco Refining and Marketing Inc., No. 88-263-JRR, D. Del.

Florida

Sierra Club v. Coca Cola Corporation and United States v. Coca Cola Company, M.D. Fla., Nos. 84-827-Civ-T-15 and 84-1021-Civ-T-15.

Legal Environmental Assistance, Inc. v. Board of County Commissioners of Bay County, Florida, No. 88-50142-RV, M.D. Fla.

Natural Resources Defense Council, Inc. v. Champion International Corporation, No. 89-30032RV, N.D. Fla.

Georgia

Natural Resources Defense Council, Inc. and Sierra Club v. Interstate Paper Corporation, No. CV 487-169, S.D. Ga.

Illinois

Natural Resources Defense Council, Inc. v. Del Monte Corporation, No. 87-C-4649, N.D. Ill.

Natural Resources Defense Council, Inc. v. Revere Copper and Brass Incorporated, No. 87-3227, C.D. Ill.

Natural Resources Defense Council, Inc. v. Outboard Marine Corporation, No. 87-C-4648, N.D. Ill.

Indiana

Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., No. F87-00095, N.D. Ind.

Atlantic States Legal Foundation, Inc. v. General Electric Company, No. EV-87-137-C, S.D. Ind.

Atlantic States Legal Foundaton, Inc. v. General Motors Corporation, Central Foundry Division, No. NA87-173-C, S.D. Ind.

Kentucky

Sierra Club v. Vanderbilt Chemical Corporation, No. C.A. 84-0175, W.D. Ky.

Louisiana

Sierra Club v. Ferro Corporation, No. C.A. 84-403-B, M.D. La.

Sierra Club v. Copolymer Rubber and Chemical Company, C.A. No. 84-407, M.D. La.

Sierra Club v. Allied Chemical Corporation, C.A. No. 84-408, M.D. La.

- Sierra Club v. Bercen Southern, C.A. No. 84-409, M.D. La.
- Sierra Club v. Formosa Plastic Corporation, C.A. No. 84-410B, M.D. La.
- Sierra Club v. Shell Oil Company, C.A. No. 84-3483, E.D. La.
- Sierra Club v. International Paper Company, C.A. No. 84-1052-S, W.D. La.
- Sierra Club v. Kerr-McGee Refining Corp., C.A. No. 84-1764 S, W.D. La.
- Sierra Club v. Olin Corporation, C.A. No. CV85-0463, W.D. La.
- Sierra Club v. Conoco, Inc., C.A. No. 85-1305, W.D. La.
- Sierra Club v. Georgia-Pacific Corporation, C.A. No. 85-443-B, M.D. La.
- Sierra Club v. Monochem, Inc., C.A. No. 85-147-B, M.D. La.

Massachusetts

- Sierra Club and Natural Resources Defense Council v. Rosemar Silver Company, No. 84-1781-G, D. Mass.
- Sierra Club and Natural Resources Defense Council v. C.G. Manufacturing, No. 84-1784-Z, D. Mass.
- Sierra Club and Natural Resources Defense Council v. Raytheon Company, No. C.A. 84-1785-MA, D. Mass.
- Sierra Club and Natural Resources Defense Council v. Handy & Harmon, C.A. No. 85-1055-K, D. Mass.
- Massachusetts Public Interest Research Group v. ICI Americas Inc., No. 89-1334-4, D. Mass.
- Natural Resources Defense Council, Inc. v. Gould, Inc., No. 89-0746-H, D. Mass.

Maryland

Chesapeake Bay Foundation, Inc. and National Resources Defense Council, Inc., v. American Recovery Company, No. M84-217, D. Md.

Chesapeake Bay Foundation, Inc. and National Resources Defense Council, Inc., v. Bethlehem Steel Corporation, C.A. No. 84-1620, D. Md.

Sierra Club v. Simkins Industries, Inc., No. HM84-4018, D. Md.

Sierra Club v. Neuva Engineering, Inc., No. HM84-4019, D. Md.

Sierra Club v. Keystone Automotive Plating Company, C.A. No. HM84-4020, D. Md.

Michigan

Public Interest Research Group in Michigan v. City of Detroit, Detroit Water and Sewerage Department, Coleman Young in his official capacity as Mayor of Detroit, and Charlie Willimas in his official capacity as Director of the DWSD, No. 88CV72107DT, E.D. Mich.

National Wildlife Federation v. Consumers Power Company, No. G85-1146, W.D. Mich.

Minnesota

Atlantic States Legal Foundation, Inc. v. Koch Refining Co., No. 4-87-634, D. Minn.

Missouri

USA, Missouri Coalition for the Environment; Wilhelmina D. Roberts and Richard Beatty v. The Metropolitan St. Louis Sewer District and the State of Missouri, No. 88-2512, E.D. Mo.

Mississippi

Cooper, et al., v. The Armstrong Rubber Company, No. J88-0464(L), S.D. Miss.

New Hampshire

Sierra Club, Natural Resources Defense Council, Inc. and Northwest Civic Association of Nashua, New Hampshire v. Mohawk Associates, Inc., No. 84-312L, D. N.H.

Natural Resources Defense Council, Inc. and Sierra Club v. W.R. Grace and Company, No. C-86-49-L, D. N.H.

Natural Resources Defense Council, Inc. and Sierra Club v. James River Paper Company, Inc., C.A. No. 85-758-L, D. N.H.

New Jersey

Student Public Interest Research Group of New Jersey, Inc. and Natural Resources Defense Council, Inc. v. J. T. Baker Chemical Company, C.A. No. 83-685, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Natural Resources Defense Council, Inc. v. Public Service Electric and Gas Company, C.A. No. 83-1603, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Ragen Precision Industries, Inc., C.A. No. 83-1604, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Natural Resources Defense Council, Inc. v. Sybron Corporation, Ionac Chemical Company Division, C.A. No. 83-1638, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Fritzsche, Dodge & Olcott Inc., C.A. No. 83-1605, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Southland Corporation, Nos. C.A. 83-1640, 83-1711, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Monsanto Company, No. 83-2040, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. American Cynamid Company, C.A. No. 83-2068D, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Tenneco Polymers, C.A. No. 83-2105, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Jersey Central Power & Light Company and GPU Nuclear Corporation, C.A. No. 83-2840, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Hercules Incorporated, C.A. No. 83-3262S, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Anchor Thread Company, C.A. No. 84-0320, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Georgia-Pacific Corporation, C.A. No. 84-1063, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. AT&T Bell Laboratories, Inc., C.A. No. 84-1087, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. National Starch and Chemical Corporation, C.A. No. 84-1119, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. P. D. Oil and Chemical Storage, Inc., C.A. No. 84-340A, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Rollins Environmental Services (NJ), Inc., C.A. No. 86-3438(JHR), D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. United States Metals Refining Company, No. 86-2041, D. N.J.

Student Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Public Service Electric and Gas Company, C.A. No. 87-2062, D. N.J.

International Union of United Automobile, Aerospace and Agriculture Implement Workers of America, AFL-CIO, the New Jersey Environmental Federation, the New Jersey State Industrial Union Council, and Four Individual Union Members v. Amerace Corp. and Harvard Industries Inc., C.A. No. 86-1833, D. N.J.

Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Borden, Inc., C.A. No. 89-3035, D. N.J.

Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Carter-Wallace, Inc., C.A. No. 87-1884, D. N.J.

Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Westwood Lighting Group, Inc., C.A. No. 86-4743, D. N.J.

Public Interest Research Group of New Jersey, Inc., et al. v. Ferro Merchandising Equipment Corp., C.A. No. 86-4741, D. N.J.

Public Interest Research Group of New Jersey, Inc. v. Top Notch Metal Finishing Company, No. 87-3894, D. N.J.

Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Exxon Company, U.S.A., C.A. No. 89-2284, D. N.J.

Public Interest Research Group of New Jersey, Inc. v. CP Chemicals, Inc., No. 87-1789, D. N.J.

Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. PNC, Inc., C.A. No. 86-4744, D. N.J.

Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Hercules, Inc., C.A. No. 89-2291(SSB), D. N.J.

Public Interest Research Group of New Jersey, Inc., et al. v. Struthers-Dunn, Inc., C.A. No. 87-1773(SSB), D. N.J.

Public Interest Research Group of New Jersey, Inc., et al. v. Powell Duffryn Terminals, Inc., C.A. No. 89-238(DRD), D. N.J.

New York

Sierra Club and Natural Resources Defense Council, Inc. v. Oneida, Ltd., Silversmiths, No. 82-CV-1303, N.D. N.Y.

Sierra Club v. Aluminum Company of America, C.A. No. 82-1304, N.D. N.Y.

Hudson River Sloop Clearwater, Inc. and Natural Resources Defense Council, Inc. v. White Mop Wringer Company, N.D. N.Y., No. 82-CV-1306

Hudson River Sloop Clearwater, Inc. v. Consolidated Rail Corporation, No. 82-CV-1307, N.D. N.Y.

Hudson River Sloop Clearwater, Inc. v. Hudson Valley Apple Products Co., Inc., No. 82-CV-1308, N.D. N.Y.

Sierra Club v. SCM Corporation, C.A. No. 82-1076T, W.D. N.Y.

Sierra Club v. The Hanna Furnace Corporation, C.A. No. 82-1077E, W.D. N.Y.

Sierra Club v. United States Gypsum Company, C.A. No. 82-1078-E, W.D. N.Y.

Sierra Club v. Philips ECG, Inc., C.A. No. 83-52T, W.D. N.Y.

Sierra Club and Natural Resources Defense Council v. Interpace Corporation, C.A. No. 83-0127C, W.D. N.Y.

Friends of the Earth, Atlantic States Legal Foundation and Christian G. Spies v. Consolidated Rail Corporation, No. 83-CV-1506, N.D. N.Y.

Friends of the Earth, Atlantic States Legal Foundation and Christian G. Spies v. Crucible Materials Corporation, No. 84-CV-286, N.D. N.Y.

Friends of the Earth, Atlantic States Legal Foundation and Richard Fedele v. Archer Daniels Midland Company, Nabisco Brands Inc. and Clinton Corn Processing Co., C.A. No. 84-413, N.D. N.Y.

Atlantic States Legal Foundation and Friends of the Earth v. Chagrin Fibers Inc., No. 84-CV-414, N.D. N.Y.

Atlantic States Legal Foundation And Friends of the Earth v. Welch Allyn, Inc., No. 84-CV-415, N.D. N.Y.

Friends of the Earth, Atlantic States Legal Foundation and Christian G. Spies v. Eastman Kodak Company, No. CIV-84-0316, W.D., N.Y.

Friends of the Earth and Atlantic States Legal Foundation, Inc. v. Corning Glass Works, No. CIV-84-0356T, W.D. N.Y.

Friends of the Earth and Atlantic States Legal Foundation, Inc. v. Facet Enterprises, Inc., C.A. No. 84-0357T, W.D. N.Y.

Atlantic States Legal Foundation, Inc. v. AL Tech Specialty Steel Corporation, No. 84-CV-1040, N.D. N.Y.

Atlantic States Legal Foundation, Inc. v. IBM Corporation, C.A. No. 84-6756, S.D. N.Y.

Atlantic States Legal Foundation, Inc. v. Central Hudson Gas & Electric Corporation, C.A. No. 85-0500, S.D. N.Y.

Atlantic States Legal Foundation v. Ferroxcube Division of Amperex Electronic Corporation, No. 87-CV-0068, N.D. N.Y.

Natural Resources Defense Council, Inc. v. Amperex Electronic Corporation, No. 87-4057, E.D. N.Y.

Atlantic States Legal Foundation, Inc. v. General Motors Corporation, General Foundry Division, No. 87-CV-1289, N.D. N.Y.

Atlantic States Legal Foundation, Inc. and State of New York and Thomas C. Jorling, Commissioner of NYS DEC, v. The Onondaga County Department of Drainage and Sanitation and Onondaga County, NY, No. 88-CV-0066, N.D. N.Y.

New York Public Interest Research Group, Inc.; The Coalition to Save Hempstead Harbor, Inc.; Paul Thurman; Patty Conti, et al. v. Limco Manufacturing Corporation, No. CV-87-2850, E.D. N.Y.

Atlantic States Legal Foundation, Inc. v. Reynolds Metals Company, No. 88-CV-640, N.D. N.Y.

Hudson River Fishermen's Association v. County of Westchester, Andrew O'Rourke, County Executive, No. 87-CIV-1575, S.D. N.Y.

Atlantic States Legal Foundation, Inc. v. Bristol-Myers Company, No. 89-C4-1430, N.D. N.Y.

Atlantic States Legal Foundation, Inc. v. General Motors Corporation-Fisher Guide Division, No. 86-CV-237, N.D. N.Y.

North Carolina

North Carolina Wildlife Federation v. Colonel Paul Woodbury, No. 87-581-CIV-5, E.D. N.C.

Ohio

Natural Resources Defense Council, Inc. and Sierra Club v. Imperial Clevite, Inc., C.A. No. C2-85-1875, S.D. Ohio.

The Ohio Environmental Council v. Vari-Seal Manufacturing Corporation, No. C88-3299, N.D. Ohio.

Ohio Public Interest Research Group v. Wheeling-Pittsburgh Steel Corporation, No. C2-88-1253, S.D. Ohio.

Oregon

Sierra Club v. Electronic Controls Design, Inc., No. 87-905MA, D. Or.

Northwest Environmental Defense Center, Lower Twaltin Valley Home Owners Association, Twaltin Riverkeepers, Twaltin Dam Park Home Owners League, and various individuals v. Unified Sewerage Agency of Washington County, No. 88-1128-FR, D. Or.

Pennsylvania

Sierra Club v. Armco, Inc., C.A. No. 84-2959, W.D. Pa.

Sierra Club v. Loewengart & Co., Inc., No. C.A. No. 85-0591-H, M.D. Pa.

Raymond Proffitt v. Rohm and Haas Co., No. 85-4966, E.D. Pa.

Raymond Proffitt v. United States Steel Corporation, C.A. No. 85-4905, E.D. Pa.

Atlantic States Legal Foundation, Inc. v. American Nickeloid Company, C.A. No. 86-4628, E.D. Pa.

Sierra Club v. Babcock & Wilcox Company, C.A. No. 86-1927, W.D. Pa.

Atlantic States Legal Foundation v. Pennsylvania Electric Company, No. 86-1385, W.D. Pa.

Atlantic States Legal Foundation, Inc. v. Crompton & Knowles Corporation, C.A. No. 86-5925, E.D. Pa.

Atlantic States Legal Foundation, Inc. v. Furman Foods, Inc., No. 87-0053, M.D. Pa.

Atlantic States Legal Foundation, Inc. v. Sharon Steel Corp., C.A. No. 86-887, W.D. Pa.

Pennsylvania Environmental Defense Foundation, v. The Borough of Bellefonte, Civ. No. 88-0992, M.D. Pa.

Natural Resources Defense Council, Inc. and Sierra Club v. Duquesne Light Company, C.A. Nos. 87-0511, W.D. Pa.

Raymond Proffitt and Joseph Turner v. Lower Bucks County Joint Municipal Authority, No. 86-7220, E.D. Pa.

Pennsylvania Environmental Defense Foundation v. Packaging Corporation of America, No. 87-4739, E.D. Pa.

Natural Resources Defense Council, Inc. and Sierra Club v. Pennsylvania Electric Company, Nos. 87-0512 and 87-0513, W.D. Pa.

Atlantic States Legal Foundation, Inc. v. Penntech Papers, Inc., Civ. No. 86-255E., W.D. Pa.

Natural Resources Defense Council, Inc. and Sierra Club v. USX Corporation, No. 87-0317, W.D. Pa.

Corco (Coalition of Religious and Civic Organizations) and Joseph Welsh and Mary Ellen Noble, et al. v. Pfizer Pigments, Inc. and Easton Area Joint Sewer Authority, No. CA 88-1359, E.D. Pa.

Tobyhanna Conservation Association v. Country Place Waste Treatment Company, No. 89-0823, M.D. Pa.

Raymond Proffitt v. The Municipal Authority of The Borough of Morrisville, et al., No. 86-4604, E.D. Pa.

Raymond Proffitt v. Bristol Township Authority, et al., Nos. 83-5022 and 83-0170, E.D. Pa.

Hudson River Fishermen's Association v. Mobil Oil Corporation, C.A. No. 86-4628, E.D. Pa.

Puerto Rico

Comite Pro Rescate De La Salud, et al. v. Puerto Rico Aqueduct and Sewer Authority, et al., No. 87-01643, D. P.R.

Rhode Island

Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corporation, No. 83-0740S, D. R.I.

Tennessee

Natural Resources Defense Council, Inc. v. Eastman Kodak Company, Inc., No. CIV-2-87-165, E.D. Tenn.

Texas

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Natural Resources Defense Council, Inc. v. FMC Corporation, No. 2:87-0793, S.D. W. Va.

1

APPENDIX O



APPENDIX O

PLAINTIFFS' AFFIDAVITS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

STUDENT PUBLIC INTEREST	:	
RESEARCH GROUP OF N.J.,	:	
Inc., <i>et al.</i> ,	:	HON. HAROLD
	:	A.
Plaintiffs,	:	ACKERMAN
v.	:	
P.D. OIL & CHEMICAL STORAGE,	:	Civil No.
INC.	:	84-340 A
	:	
Defendants.	:	

AFFIDAVIT OF SHELDON ABRAMS

I, Sheldon Abrams, do hereby affirm and state:

1. My address is 27 Carriage House Lane, Little Silver, N.J. 07739.

2. I am a member of Friends of the Earth (FOE).

3. I drive by the Kill Van Kull regularly. I have noticed that the shores are black and there is an oily sheen on the water. I boat and fish in Lower New York Bay, into which the Kill Van Kull flows, approximately once a week.

4. If the water in the Kill Van Kull were cleaner, I could boat and fish in it. I would also get greater enjoyment out of my activities on Lower New York Bay because the water flowing into Lower New York Bay from the Kill Van Kull would be cleaner.

5. I support FOE in its efforts to enforce laws controlling water pollution in the Kill Van Kull and Lower New York Bay.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on _____.

/s/ Sheldon Abrams

Sheldon Abrams

STUDENT PUBLIC INTEREST	:	
RESEARCH GROUP OF N.J.,	:	
Inc., <i>et al.</i> ,	:	HON. HAROLD
	:	A.
Plaintiffs,	:	ACKERMAN
v.	:	
P.D. OIL & CHEMICAL STORAGE,	:	Civil No.
INC.	:	84-340 A
Defendants.	:	

I, Mylissa Ven Ditti, do hereby affirm and state:

1. My address is 129 Lexington Ave., Bayonne, N.J. 07002. This location is four blocks north of Kill Van Kull.
2. I have been a member of the Student Public Interest Research Group of New Jersey (NJPIRG) since September 1983.
3. I have played tennis, jogged, bicycled and played baseball in the park along the Kill Van Kull; I have been going to the park for 18 years. Until September, I went to the park once a week and now I go about once a month.
4. The water in the Kill Van Kull looks polluted and greasy. It has garbage floating in it and is brown. On some days it smells. If the water were not polluted, I would swim in it.
5. I support the NJPIRG in its efforts to enforce laws controlling water pollution in the Kill Van Kull.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on November 23, 1984.

/s/ Myllissa Ven Ditti
Myllissa Ven Ditti

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

STUDENT PUBLIC INTEREST
RESEARCH GROUP OF N.J.,
Inc., *et al.*,

Plaintiffs,

v.

P.D. OIL & CHEMICAL STORAGE,
INC.,

Defendant.

AFFIDAVIT OF CHERYL CUMMINGS

I, Cheryl Cummings, do hereby affirm and state:

1. My address is 28 Broadway, Bayonne, N.J. 07002. During the school term I reside at 117 Benner St., Highland Park, N.J. 08903. My home in Bayonne is one block north of the Kill Van Kull.

2. I have been a member of the Student Public Interest Research Group of New Jersey (NJPIRG) since September 1983.

3. My family and I have used the park along the Kill Van Kull for the past nineteen years. During the summer months, I bike and jog in the park every other day.

4. The water in the Kill Van Kull looks and smells terrible. The pollution in the Kill Van Kull has diminished my enjoyment of the park. The park is often not a pleasant place to be.

5. I support the efforts of NJPIRG to enforce laws controlling water pollution in the Kill Van Kull.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on October 28, 1984.

/s/ Cheryl Cummings
Cheryl Cummings

STUDENT PUBLIC INTEREST,	:	
RESEARCH GROUP OF N.J.,	:	
Inc., <i>et al.</i> ,	:	HON. HAROLD
	:	A.
Plaintiffs,	:	ACKERMAN
v.	:	
P.D. OIL & CHEMICAL STORAGE,	:	Civil No.
INC.,	:	84-340 A
Defendants.	:	

5. I believe the pollution in the waters of the Kill Van Kull and Lower New York Bay decreases the value of my home because the pollution makes Staten Island a less pleasant place to live.

6. I support FOE in its efforts to enforce laws controlling water pollution in the Kill Van Kull and Lower New York Bay.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on Oct. 20, 1984.

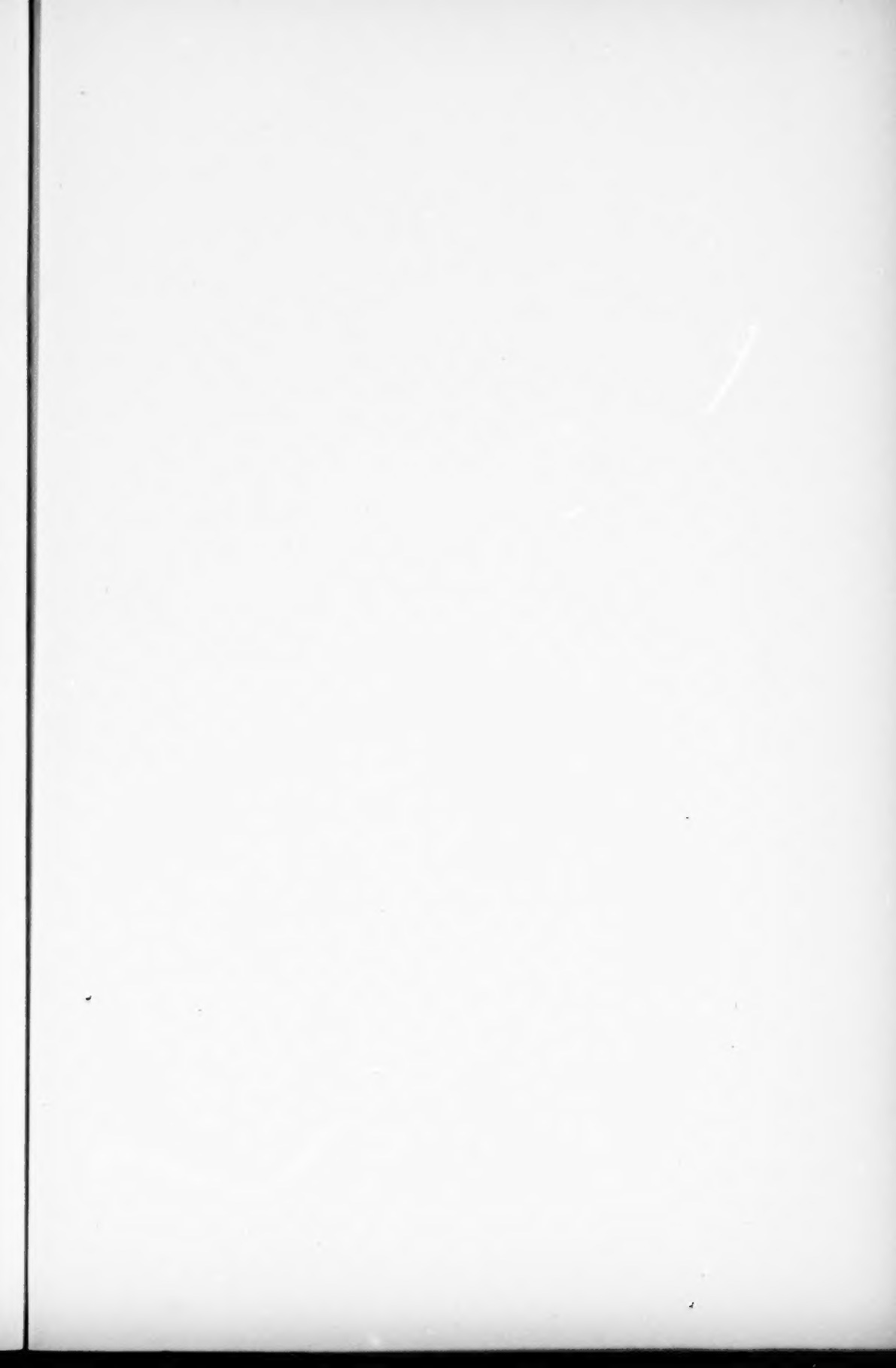
/s/ Andrew Gerbino

Andrew Gerbino

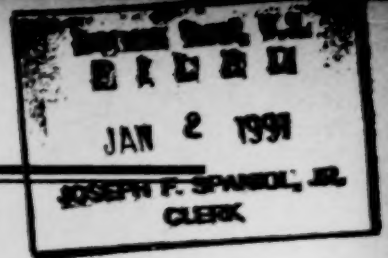
Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on Oct. 27, 1984.

/s/ Douglas MacNeil

Douglas MacNeil



(2)
No. 90-867



IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

POWELL DUFFRYN TERMINALS INC.,
Petitioner,
v.

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC.,
FRIENDS OF THE EARTH AND UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Petition For Writ Of Certiorari
To The United States
Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENTS
PUBLIC INTEREST RESEARCH GROUP OF
NEW JERSEY, INC. AND FRIENDS OF THE EARTH
IN OPPOSITION

*BRUCE J. TERRIS
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(202) 682-2100

*Counsel for Respondents Public
Interest Research Group
of New Jersey, Inc. and
Friends of the Earth*

**Counsel of Record*

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY CONCLUDED THAT RESPONDENTS, PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC. AND FRIENDS OF THE EARTH, HAVE STANDING TO MAINTAIN THIS CITIZEN SUIT UNDER SECTION 505 OF THE FEDERAL WATER POLLUTION CONTROL ACT, 33 U.S.C. 1365.

PARTIES TO THE PROCEEDINGS

Respondents Public Interest Research Group of New Jersey, Inc. and Friends of the Earth are non-profit environmental organizations. Neither corporation has any parent or subsidiary corporations.

The United States Environmental Protection Agency is also a respondent.

Petitioner Powell Duffryn Terminals Inc. is a wholly owned subsidiary of Powell Duffryn plc.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

No. 90-867

POWELL DUFFRYN TERMINALS INC.,
Petitioner,

v.

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC.,
FRIENDS OF THE EARTH AND UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

**On Petition For Writ Of Certiorari
To The United States
Court Of Appeals For The Third Circuit**

**BRIEF FOR RESPONDENTS
PUBLIC INTEREST RESEARCH GROUP OF
NEW JERSEY, INC. AND FRIENDS OF THE EARTH
IN OPPOSITION**

Respondents, Public Interest Research Group of New Jersey, Inc. and Friends of the Earth, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 913 F.2d 64.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions set forth in the petition (Pet. 2-3), the following portion of Section 505 of the Federal Water Pollution Control Act, 33 U.S.C. 1365(g), is relevant:

- (g) For the purpose of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

STATEMENT OF THE CASE

This is a citizen suit under Section 505 of the Federal Water Pollution Control Act, 33 U.S.C. 1365. Petitioner seeks to have this Court review the court of appeals' conclusion that the respondent environmental groups established their standing to maintain this action.

1. Proceedings in the District Court

Petitioner filed a motion to dismiss the complaint under Rule 12 of the Federal Rules of Civil Procedure based on respondents' alleged lack of standing. In support of its motion, petitioner relied upon the deposition transcripts of the members of the respondent organizations upon whom respondents relied to establish their standing. Respondents submitted affidavits from those members. See Pet. App. O. Therefore, the district court treated petitioner's motion to dismiss as a motion for summary judgment under Rule 56. *SPIRG v. P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1081 (D.N.J. 1986).

The record below showed that petitioner discharged pollutants in violation of its National Pollutant Dis-

charge Elimination System/New Jersey Pollutant Discharge Elimination System (NPDES/NJPDES) permit into the Kill Van Kull (J.A. 2143-2217, 2915-3092, 3114-3368)¹ and that the Kill Van Kull is a tidal waterway which connects Newark Bay to the west with New York Bay to the east (J.A. 618). The record also showed that members of NJPIRG and Friends of the Earth have recreational, aesthetic and environmental interests in the Kill Van Kull and the related waterways of the New York Harbor Complex.

As the district court found, Cheryl Cummings, a member of NJPIRG, whose family home in Bayonne, New Jersey, is a mile from the Kill Van Kull, has used Kill Van Kull Park for biking and jogging for 19 years. 627 F. Supp. at 1081; Pet. App. 4o. Ms. Cummings testified that the pollution of the Kill Van Kull has diminished her enjoyment of the Park. *Ibid.* She described the water of the Kill Van Kull as having "a film" which is "sometimes like a rainbow or sometimes like greenish-yellow." 627 F. Supp. at 1082; J.A. 253. "The park is often not a pleasant place to be." 627 F. Supp. at 1081; Pet. App. 4o.

Sheldon Abrams, a member of Friends of the Earth, has noticed that the shores of the Kill Van Kull "are black and there is an oily sheen on the water" during his regular drives there. 627 F. Supp. at 1082; Pet. App. 1o. Mr. Abrams boats in Lower New York Bay, into which the Kill Van Kull flows. *Ibid.* He stated that he would enjoy boating in New York Bay more if the water flowing into it from the Kill Van Kull were cleaner, and that he would boat and fish in the Kill Van Kull itself if it were cleaner. *Ibid.*

¹ "J.A." is a citation to the Joint Appendix filed by the parties in the court of appeals.

Andrew Gerbino, a member of Friends of the Earth, lives on the Staten Island side of the Kill Van Kull. 627 F. Supp. at 1082; Pet. App. 50. He testified that the pollution of the Kill Van Kull and Lower New York Bay has decreased the value of his home. *Ibid.* Mr. Gerbino used to walk along the Staten Island side of the Kill Van Kull, but he no longer does because it is so polluted. 627 F. Supp. at 1082; J.A. 316-317. Mr. Gerbino also stated that he can no longer eat any crabs or clams caught in the area, although in the past "all these waters used to be used for lobster catching and clamming, crab catching. You don't see anyone doing that anymore." 627 F. Supp. at 1082; J.A. 319-320.

Douglas MacNeil, a member of Friends of the Earth, stated that he birdwatches in Kill Van Kull Park about five times a year, and hikes and birdwatches at the Global Marine Terminal and in Liberty Island State Park, both of which are on Upper New York Bay. Pet. App. 70. Dr. MacNeil explained that his interests are affected by the condition of the waters of the Kill Van Kull because (J.A. 357):

as a birdwatcher, which is my main recreational activity in this area, if the waters are a certain quality, there will be more or less wildlife. If there's more, then it's better for me.

Besides that, if the waters are unappealing to me as an individual, it will inhibit me from using the area for birdwatching. In fact, it does. I don't come here as often as I might if I felt the water was better.

Mylissa VenDitti, a member of NJPIRG, testified that she has gone to Kill Van Kull Park, which is four blocks from her family home in Bayonne, all of her life. Pet. App. 30. She has used the Park for tennis, jogging, bicycling and baseball. *Ibid.* She further stated that "the water in the Kill Van Kull looks polluted and greasy. It has garbage floating in it and is brown. On some days it smells. If the water were not polluted, I would swim in it." *Ibid.*

The district court denied petitioner's motion for summary judgment as to respondents' standing and concluded that respondents had established their standing as a matter of law. 627 F. Supp. at 1083. Petitioner then moved the court to certify the issue of standing for interlocutory appeal which the court declined to do. Pet. App. E.

The district court issued three orders finding petitioner liable for a total of 386 violations of its NPDES/NJPDES permit. 627 F. Supp. at 1090; Pet. App. E, 10e-11e; Pet. App. C. The case proceeded to trial on the issue of appropriate relief for petitioner's violations of the Act. In the Final Pretrial Order, the parties entered a stipulation under which defendant waived its right to cross-examine respondents' members on standing at trial and stipulated that the evidentiary basis for standing was unchanged since the district court's summary judgment decision. J.A. 615.

After trial, the district court imposed a civil penalty of \$3.205 million on defendant and a permanent injunction against future violations of its permit. *PIRG v. Powell Duffryn Terminals Inc.*, 720 F. Supp. 1158, 1166-1167, 1168 (D.N.J. 1989). In imposing the penalty and injunction, the district court found that petitioner's violations "were very serious in nature"

and that "some of defendant's effluent was toxic to marine organisms because defendant's violations involved toxic pollutants and pollutants with the potential to cause environmental harm to the waters." 720 F. Supp. at 1163. The district court further found that petitioner "was content to go on polluting the Kill Van Kull indefinitely" (720 F. Supp. at 1164) and that "defendant, motivated possibly by greed or apathy, chose to procrastinate" (*id.* at 1165). The district court also found that the maximum penalty which could be imposed against petitioner of \$4.205 million should be reduced by \$1 million because of the lack of diligence of the United States Environmental Protection Agency (EPA) and the New Jersey Department of Environmental Protection (DEP) in enforcing the water pollution control laws against petitioner. *Id.* at 1166-1167. Finally, the district court ordered that the penalty monies be paid to a trust fund for the improvement of the environment of New Jersey, rather than to the U.S. Treasury. *Id.* at 1168.

2. The Court of Appeals

Petitioner appealed the decision of the district court to the United States Court of Appeals for the Third Circuit on numerous grounds, including respondents' standing. Respondents cross-appealed the reduction of the civil penalty. EPA filed a notice of appeal in the district court and moved to intervene in the court of appeals in order to oppose the reduction of the civil penalty based on the conduct of itself and New Jersey DEP and to challenge the use of the penalty funds for environmental improvement projects in New Jersey. EPA was granted leave to intervene in the court of appeals. See Appendix 1 attached.

The court of appeals concluded that respondents had established their standing to maintain this action, based on the decision of this Court in *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982). *Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 70-73 (3d Cir. 1990). Judge Aldisert wrote a concurring opinion to express "a nagging doubt" as to standing. *Id.* at 83-89.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition Should Be Denied Because the Question Presented in the Petition Will Not Affect the Substantive Rights of the Parties

EPA is a party to this action as a result of being granted leave to intervene in the court of appeals.² See Appendix 1 attached. "When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party." *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985); *Marcaida v. Rascoe*, 569 F.2d 828, 831 (5th Cir. 1978). See also 5 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1920, p. 488 (1986).

EPA, as the agency charged by Congress with enforcing the Water Act, without question has standing to maintain this action for civil penalties, declaratory

² By a letter dated December 7, 1990, the Solicitor General informed this Court that because the only issue sought to be raised by petitioner is the standing of the environmental groups, EPA would not respond to the Petition for a Writ of Certiorari unless requested to do so by the Court.

and injunctive relief against petitioner.³ So long as one of several plaintiffs in an action has standing, all may remain in an action. *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264, and n. 9 (1977); *Buckley v. Valeo*, 424 U.S. 1, 12 (1976)(*per curiam*). Because EPA clearly has standing, this Court would not reach the issue which petitioner seeks to have reviewed.

Therefore, the question of whether respondents have standing to maintain this action, independent from EPA, will not affect the substantive rights of the parties. In these circumstances, the petition for a writ of certiorari should be denied. See *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. * * * Resolution [of the issue presented] here * * * can await a day when the issue is posed less abstractly").

2. The Petition Demonstrates No Conflict Between the Decision Below and Any Decision of this Court or Any Court of Appeals Decision

The petition argues broadly that the decision of the court of appeals in this case "is fundamentally inconsistent with this Court's application of Article III and the Constitution's limitation on the federal judi-

³ This Court has held that an intervenor may "continue a suit in the absence of the party on whose side intervention was permitted * * * [provided that the intervenor shows] that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986)(citing *Mine Workers v. Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335, 338 (1945)).

cial power." Pet. 17. However, the petition includes no specific grounds on which the court of appeals' decision conflicts with any decision of this Court.⁴ Thus, far from creating a "'special exception' for environmental cases," as petitioner alleges (Pet. 19), the court of appeals applied the well-established law of this Court to the facts of the case before it.⁵

The decision below relies upon and applies the three requirements for Article III standing set forth in *Valley Forge Christian College v. Americans United*, *supra*, 454 U.S. at 472—injury, causality, and redressability. See 913 F.2d at 70-73. First, the court of appeals found that respondents had produced affidavits demonstrating injury to their "aesthetic and recreational interests [which were] sufficient to confer standing." 913 F.2d at 71 (citing *Sierra Club v. Mor-*

⁴ It is well established that organizations may bring suit on behalf of their members. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977); *International Union v. Brock*, 477 U.S. 274, 289 (1986). The petition makes no claim that the standards for organizational standing, apart from the standing of respondents' members, were not met here.

⁵ Petitioner makes much of the concurring opinion, in which Judge Aldisert stated that he joined the majority in concluding that plaintiffs had established standing in spite of his own reservations that "constitutional standing is a serious question here." 913 F.2d at 85. See Pet. 12, 13, 16, 17, 18, 20, 22. The concurrence suggests that the majority relaxed the ordinary requirements of standing. 913 F.2d 84, 89. However, there is nothing in the majority opinion to support this suggestion. In addition, none of the decisions of other courts of appeals which have considered the showing necessary for standing under the Water Act (see pp. 11-12 below) gives any indication that traditional standing principles are being relaxed for Water Act cases.

ton, 405 U.S. 727, 735 (1972)). Petitioner does not challenge this holding.

Next, the court of appeals considered the "causation" requirement for standing, *i.e.*, whether respondents' injuries were "fairly traceable" to petitioner's illegal conduct. 913 F.2d at 71-73. Relying on *Valley Forge, supra*, 454 U.S. at 473, and *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75, n. 20 (1978), the court of appeals rejected petitioner's claim that "plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs." 913 F.2d at 72. Instead, the court of appeals held, quoting *Duke Power Co., supra*, 438 U.S. at 75, n. 20, that, in a citizen suit under the Water Act, plaintiffs must establish a "'substantial likelihood' that defendant's conduct caused plaintiffs' harm." *Ibid.* In order to do this, the court of appeals said that plaintiffs must show (*ibid.*):

that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest which is or may be adversely affected and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs. (footnote omitted)

The court of appeals found that plaintiffs satisfied these requirements. *Ibid.*

Third, the court of appeals addressed the application of the redressability requirement to this case. 913 F.2d at 73. Plaintiffs sought and were granted

a permanent injunction against defendant's future violations of the Water Act and civil penalties. *Id.* at 81, 83. The court of appeals concluded that both aspects of relief would redress plaintiffs' injuries caused by defendant's contribution to the pollution of the Kill Van Kull (*id.* at 73):

The purpose of the Act is to restore the chemical, physical and biological integrity of the nation's waters. Where a plaintiff complains of harm to water quality because a defendant exceeded its permit limits, an injunction will redress that injury at least in part. If PDT complies with its permit, the pollution in the Kill Van Kull will decrease. Plaintiffs need not show that the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III.

There is also a connection between civil penalties and the injuries to PIRG's members. * * * The general public interest in clean waterways will be served in this case by the deterrent effect of an award of civil penalties. Penalties will deter both PDT specifically and other NPDES permit holders generally.

The court of appeals' decision is supported by this Court's statement in *Tull v. United States*, 481 U.S. 412, 422 (1987), that deterrence is one of the principal purposes in assessing civil penalties under the Water Act. In addition, every other circuit court which has considered the issue has come to the same conclusion as the court below. *Atlantic States Legal Foundation*

v. Tyson Foods, 897 F.2d 1128, 1136 (11th Cir. 1990)(civil penalties, even if payable only to the U.S. Treasury, deter future violations); *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 695-696 (4th Cir. 1989)(appeal after remand in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987))(civil penalties for past violations are likely to redress a citizen-plaintiff's injury); *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988), certiorari denied, 109 S.Ct. 3185 (1989)(payment of civil penalties to the U.S. Treasury may deter future violations).

Finally, we note that the decision below is in full accord with the decisions of other courts of appeals which have considered the standing of citizen-plaintiffs under the Water Act. See, e.g., *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985)(plaintiffs established standing by showing their members travelled near river into which defendant discharges, were offended by its appearance, picnicked along river and swam and fished in river); *Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2d Cir. 1984)(plaintiff established standing by showing that one or more of its members used the waters into which defendant discharged so that they would be affected by its pollution); *Sierra Club v. Simkins Industries, Inc.*, *supra*, 847 F.2d at 1112-1113, n. 3 (plaintiff established standing by showing that one of its members hiked along the river and had been "adversely affected physically, aesthetically and emotionally" by defendant's pollution). Petitioner does not even claim that any court of appeals decision conflicts with the decision below.

Since the decision below does not conflict with any decision of this Court or of another court of appeals, the petition for a writ of certiorari should be denied.

3. Neither the Decision Below nor the Record Raises the Question Presented in the Petition

The sole question presented in the petition is "whether the causation and redressability requirements of Article III [standing] may be relaxed in citizen suits under the Federal Water Pollution Control Act * * *." Pet. i. However, as shown above (pp. 8-12), the decision of the court of appeals does not "relax" the causation and redressability requirements for Article III standing. We will now show that the court of appeals correctly applied the law to the facts of this case.

a. Respondents Demonstrated a Causal Connection Between Their Injuries and Petitioner's Illegal Discharge of Pollutants

Petitioner claims that it produced "unrebutted" affidavit evidence "that it is not the cause of nor does it contribute to; the environmental injuries complained of by plaintiffs." Pet. 5. Petitioner misstates the record.⁶

⁶ Petitioner cites an interrogatory response by respondents in which they stated that they did not have information or expert reports regarding the impacts of defendant's pollutants on the Kill Van Kull or related waterways. Pet. 8. However, while respondents did not present an environmental impact assessment of the harm petitioner's violations caused to the receiving waters, based on their legal contention that the Water Act requires no such showing (33 U.S.C. 1251, 1311), respondents did present testimony and other evidence regarding the harm which the pollutants petitioner discharged in violation of its permit cause to human health, aquatic life and the marine environment. J.A.

The record is clear that the Kill Van Kull and the tidally related waters of Upper and Lower New York Bay are seriously polluted. 720 F. Supp. at 1167; J.A. 2473-2562, 2705-2709, 3730-3731. Petitioner admits that it discharges wastewater to the Kill Van Kull. Pet. 4-5. Respondents presented evidence that petitioner committed repeated violations of its NPDES/NJPDES permit. *SPIRG v. P.D. Oil & Chemical Storage, Inc.*, *supra*, 627 F. Supp. at 1090; Pet. App. C, 2c-4c; Pet. App. E, 10e-11e. Thus, contrary to petitioner's claim, its repeated discharges of pollutants in excess of its permit limitations to the Kill Van Kull contributed to the polluted condition of that waterway and the other waterways to which it is tidally connected. Therefore, defendant contributed to the injury to plaintiffs' members caused by the polluted condition of these waterways.

Moreover, the record contains additional evidence to support respondents' claim that the injuries of their members are fairly traceable to petitioner's violations of the Water Act. The court of appeals cited the fact that respondents' members VenDitti, Abrams and Gerbino were injured by the oily appearance of the Kill Van Kull and that petitioner discharged excess oil and grease to the Kill Van Kull in violation of its NPDES/NJPDES permit. 913 F.2d at 73. In fact, petitioner committed 48 such violations. 720 F. Supp. at 1161. The testimony of petitioner's own water quality expert at trial showed that sediment in the area of the Kill Van Kull near defendant's outfall consistently contained considerably more oil than sediment

1445-1463, 2473-2562, 2705-2709, 3376-3465, 3617-3701, 3725-3731, 3732-3747.

in other sites in the same waterway. J.A. 1983-1985. See also J.A. 1006.

Other evidence in the record shows a connection between defendant's violations and the harm cited by respondents' members. For example, member Gerbino testified that (J.A. 322):

Q: [By Mr. Edelstein] Do you have any facts on which you base a statement that you have any interests adversely affected by this defendant's discharge?

A: [By Mr. Gerbino] Yes, because I can't go crabbing and I can't go fishing and I can't eat the clams in the local waters— Of course I'm affected.

Q: By this defendant's discharge?

A: By all the discharges, yours included.

Q: That's the basis of your participation in this lawsuit?

A: Yes.

See also Pet. App. O, 50. Member Gerbino thus testified that his interest in the aquatic life in the Kill Van Kull and related waterways is harmed by petitioner's discharge of pollutants.

The district court found, based on evidence submitted by respondents (J.A. 3376-3465, 3617-3701, 3732-3747, 1445-1463), that many of the substances discharged by petitioner are harmful to aquatic life. For example, petitioner discharged excessive quantities of the toxic pollutants phenol and methylene

chloride (720 F. Supp. at 1161).⁷ The district court further concluded that petitioner's BOD (biochemical oxygen demand) and COD (chemical oxygen demand) violations, which account for 161 of the 386 total violations, "deplet[e] the amount of oxygen available for use by fish and plants. Without adequate oxygen, fish and plants die * * *." *Ibid.*; see J.A. 1457-1459, 3644-3649, 3678-3688, 3737-3740. The district court found that TSS (total suspended solids) violations "can have an adverse affect on fish growth and reproduction and reduce the supply of food available to the fish." *Ibid.*; see J.A. 1459-1460, 3665-3670, 3697-3701, 3741-3742. Petitioner violated the TSS limits 66 times. 720 F. Supp. at 1161. The district court also noted that pH violations may have adverse physiological impacts on fish which "increase in severity as the degree of deviation [outside the acceptable range of 6.5 to 9.0 Standard Units] increases until lethal levels are reached." *Id.* at 1162; see J.A. 1461-1462, 3650-3659, 3689-3695, 3740-3741. Petitioner committed 63 pH violations. 720 F. Supp. at 1161. Thus, the record showed that petitioner's permit violations contributed to Mr. Gerbino's injury due to the loss of aquatic life in the Kill Van Kull and related waterways.

⁷ "Toxic pollutant" means "those pollutants or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring." 33 U.S.C. 1362(13).

Several members stated that they were offended by the color of the water in the Kill Van Kull which Ms. VenDitti described as "brown" (Pet. App. O, 3o), Mr. Gerbino described as "black-green" (Pet. App. O, 5o), and Mr. MacNeil described as "turbid and brown" (Pet. App. O, 7o). With respect to BOD violations, respondents' expert, Dr. Bruce Bell, testified at trial that (J.A. 1458):

[T]he types of aquatic life we like to have in rivers, streams, lakes and so on are extremely sensitive to the level of dissolved oxygen. Oxygen dissolves very poorly in water, so there is a limited amount of oxygen available. If you use that up you essentially [kill] all the higher forms of life in the body of water and wind up with a [body] of water [i]n the worst case that is black and stinks.

Thus, the aesthetic injury respondents' members suffered is also related to petitioner's discharge.

As we have seen, taken as a whole, the record contains ample evidence that defendant's NPDES/NJPDES violations contributed to the injuries suffered by respondents' members. Petitioner suggests that the testimony of respondents' members themselves must establish all three aspects of the *Valley Forge* test for standing. See Pet. 8-13, 20-21. See also 913 F.2d at 87, 88 (concurring opinion). However, respondents are not limited to the affidavits and deposition testimony of their members in order to establish standing. The court may consider all of the relevant evidence in the record. See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109, n. 22 (1978)(although standing was contested largely on the

pleadings, the Court considered admissions, answers to interrogatories and exhibits appended to the answers); see also *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 608 (1990) (standing “‘must affirmatively appear in the record’” (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884))). The record here fully supports the conclusion that respondents’ injuries are fairly traceable to petitioner’s excess discharge of pollutants to the Kill Van Kull.⁸

Finally, we note that this Court’s recent decision in *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990), supports respondents’ standing in this case. There, as here, the defendant moved for summary judgment that plaintiffs did not have standing

⁸ Petitioner cites portions of the depositions of respondents’ members which show that they did not have personal knowledge of the facts regarding petitioner’s excessive discharge of pollutants to the Kill Van Kull. Pet. 9-13. Petitioner’s counsel asked each of the deponents whether they would have been able to participate in this suit if a requirement of their participation was that they each had personal knowledge of petitioner’s discharge of pollutants to the Kill Van Kull and an ability to connect the polluted conditions of which they complained in their affidavits to that discharge. See J.A. 246-252, 273-283, 318-323, 349-363, 412-435. On this basis, some of the deponents testified that they would not have agreed to participate in this suit because they lacked such information. See J.A. 246, 435. However, this testimony is not relevant to the issue of whether respondents adequately demonstrated their standing since there is no requirement that individual members of an organization have knowledge of all the facts necessary for standing. The evidence in the record, taken as a whole, not the knowledge of individual members, is the basis for determining whether standing has been established.

to challenge the governmental action at issue. *Id.* at 3188-3189. This Court held that (*id.* at 3189):

[R]ule 56(e) is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action.

In contrast, here, respondents' evidence specified the places used by their members and these locations were closely related to petitioner's discharge. Two of the five affiants live in the same city, Bayonne, New Jersey, in which petitioner's terminal is situated. Pet. App. O, 3o, 4o. Three of respondents' members recreate in the Kill Van Kull Park, which is situated on the Kill Van Kull, and is 1.8 miles downstream of petitioner's discharge point. Pet. App. O, 3o, 4o, 7o.⁹ All of respondents' members used the lands alongside the Kill Van Kull or would have used the Kill Van Kull and related waterways into which petitioner discharged pollutants.

b. Respondents Demonstrated That Their Injuries Will Be Redressed by Injunctive Relief Prohibiting Petitioner's Illegal Discharge of Pollutants and Civil Penalties

Petitioner contends that (Pet. 17):

The court of appeals also has applied new criteria for "redressability" under Article III in Clean Water Act cases. If the general

⁹ The Kill Van Kull is a tidal waterway. J.A. 1960-1961, 2477, 2516, 2559. Thus, wastewater discharged from petitioner's terminal flows east and west, depending on the direction of the tide. J.A. 1960-1961.

"public interest in clean waterways will be served" by issuance of a penalty or injunction (16a), then plaintiffs need not prove that the "actual injury" identified by the individual members, on whom they rely for standing, will be redressed by "a favorable decision." *Valley Forge*, 454 U.S. at 472.

However, petitioner mischaracterizes the holding of the court of appeals regarding redressability. As we have seen (p. 11), the decision below held that injunctive relief would redress respondents' injuries, at least in part, because "[i]f PDT complies with its permit, the pollution in the Kill Van Kull will decrease." 913 F.2d at 73. The court of appeals also held that the imposition of civil penalties will accomplish both specific deterrence of petitioner and general deterrence of other polluters. *Ibid.* The court below proposed no new criteria for redressability or any other requirement for standing.

Petitioner's contention regarding redressability amounts to an assertion that unless all of the pollution in the Kill Van Kull could be eliminated by relief obtained against it, a single polluter, respondents' injury cannot be redressed by the imposition of a permanent injunction and/or civil penalties. This clearly is not the law. If petitioner were correct, all polluters would enjoy immunity from suit so long as they discharged into waters which were already heavily polluted. Further, since Article III of the Constitution applies to EPA and the states, as well as to citizens, no plaintiff could bring enforcement actions against polluters whenever it is impossible to eliminate all sources of pollution at once or to determine the exact harm each polluter has separately caused.

Petitioner relies on cases in which this Court has concluded that the traceability and redressability requirements for standing have not been satisfied because the chain of causation involved numerous third parties between defendant's conduct and plaintiffs' injury. Pet. 20-22. For example, in *Allen v. Wright*, 468 U.S. 737, 756-761 (1984), parents of black school children claimed that their children's diminished ability to receive the benefits of education in an integrated classroom was traceable to the failure of the IRS to fulfill its obligation to deny tax-exempt status to racially discriminatory schools. The Court found that the traceability and redressability requirements had not been met because the chain of causation between the alleged injury and the challenged government conduct was too attenuated. The ability to receive a desegregated public school education would depend not so much on whether the IRS denied tax-exempt status to a racially discriminatory private school, but on whether denial of that status would induce schools to change their policies or parents of children in such schools to transfer their children to public schools. *Id.* at 758. Similarly, in *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40-46 (1976), this Court found the causative chain too tenuous and speculative to support standing, where plaintiffs could not show more than a remote possibility that their injuries—denial of access for indigents to hospital services, allegedly caused by a change in tax policies—would be redressed in any way if their suit were successful. The Court stated that there was no basis for concluding that a court-ordered change in tax policies would result in a change in hospital practices to plaintiffs' benefit. *Id.* at 43. In these cases, third parties made it highly speculative that

defendant's conduct, rather than the independent action of third parties, caused the plaintiffs' injury and therefore that any remedy against the defendant would even ameliorate the injury to the plaintiffs.

In contrast, in the present case, there are no third parties in the causal chain. The links in that chain are petitioner's discharge, the receiving waters, and the interests in, and use of, those waters by respondents' members. Petitioner's discharges directly cause a portion of the harm to respondents' members. Similarly, the remedies obtained here, a permanent injunction against such excessive discharges and civil penalties, directly alleviate a portion of that harm.

* * *

Thus, the court of appeals correctly followed the well-established law of this Court. Petitioner can point to no specific holdings of the court below which are in conflict with any decisions of this Court. Instead, petitioner disputes the application of those legal principles to the particular facts of this case. Respondents submit that the court below correctly applied the law of standing. In any event, the application of correct principles of law to a particular factual situation does not raise issues for review by this Court.

CONCLUSION

For these reasons, respondents Public Interest Research Group of New Jersey, Inc. and Friends of the Earth submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

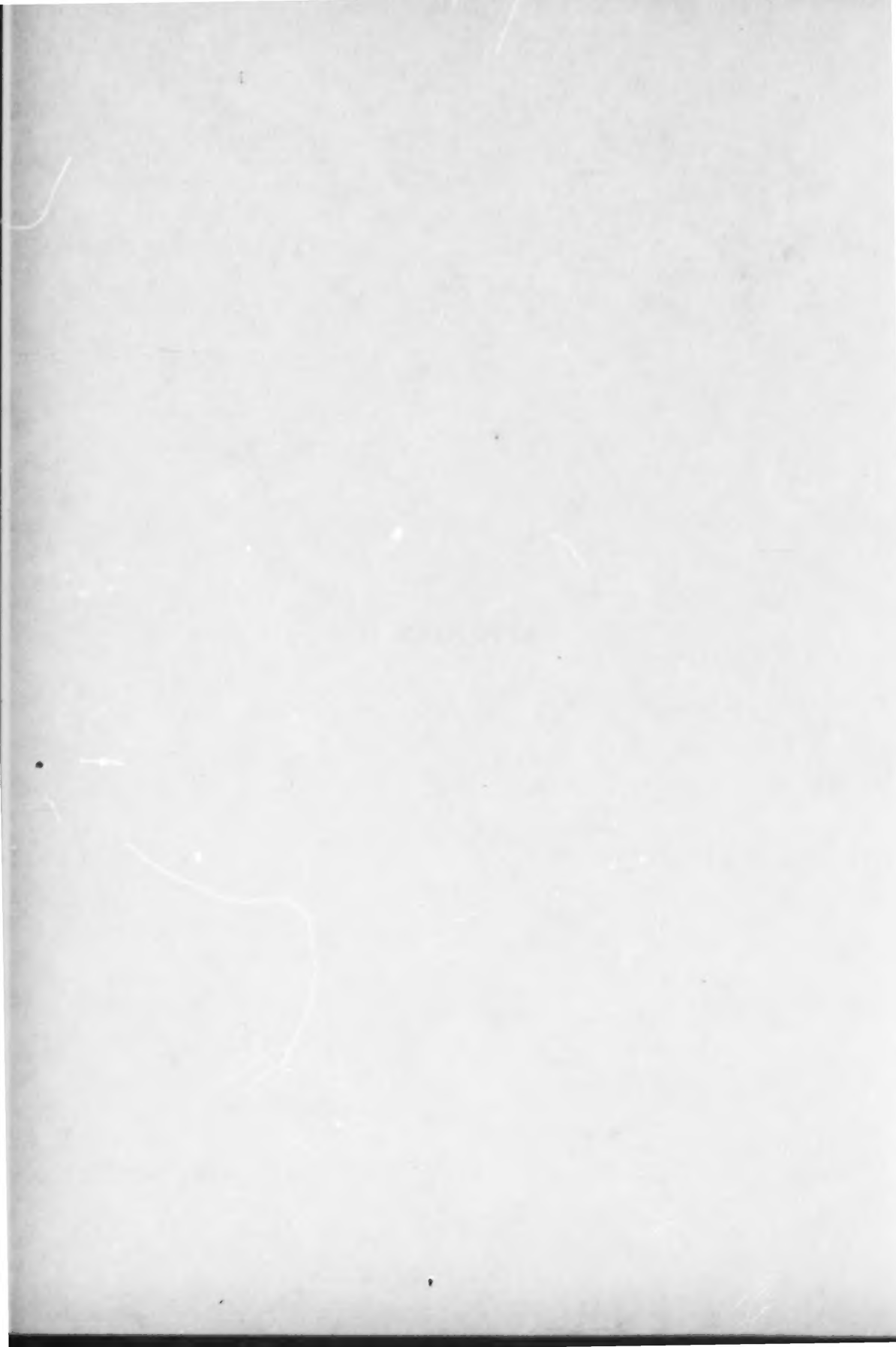
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Dated: January 2, 1991



APPENDIX 1



APPENDIX 1

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

November 7, 1989

#D-47

No. 89-5831

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY,
INC. and FRIENDS OF THE EARTH

vs.

POWELL DUFFRYN TERMINALS INC., Appellant
(D.N.J. D.C. Civ. No. 84-00340)

Present: HIGGINBOTHAM MANSMANN and COWEN,
Circuit Judges

Motion by United States Environmental Protec-
tion Agency to intervene or, in the alternative,
consider motion as Petition for Mandamus

/s/ Nannette M. DeLong
Deputy Clerk 7-0485

Appellant's brief due 12-11-89.

ORDER

The foregoing motion by United States Environmental
Protection Agency to intervene is GRANTED.

By the Court,

Dated: DEC 19 1989
DR/CC: BJT NME
KLM EL
LMK

/s/ A. Leon Higginbotham
Circuit Judge

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

POWELL DUFFRYN TERMINALS, INC.,
v. *Petitioner,*
PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC.,
FRIENDS OF THE EARTH and UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*
AND
BRIEF *AMICI CURIAE* OF
AMERICAN IRON AND STEEL INSTITUTE,
NATIONAL ASSOCIATION OF MANUFACTURERS,
CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY,
AMERICAN CYANAMID COMPANY, BORDEN, INC.,
CHEVRON CORPORATION, THE COCA-COLA
COMPANY, DRESSER INDUSTRIES, INC., HERCULES,
INCORPORATED, JERSEY CENTRAL POWER & LIGHT
COMPANY, MONA INDUSTRIES, INC., MURPHY OIL,
USA, INC., PHELPS DODGE CORPORATION, SANDOZ
PHARMACEUTICALS CORPORATION, SMITHFIELD
FOODS, INC., TYSON FOODS, INC., USX CORPORATION,
UNIVERSAL TOOL & STAMPING CO., INC.
and WARD TRANSFORMER CO., INC.
IN SUPPORT OF PETITIONER

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-867

POWELL DUFFRYN TERMINALS, INC.,
v. *Petitioner,*

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC.,
FRIENDS OF THE EARTH and UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

**On Petition for Writ of Certiorari to the United States
Court of Appeals for the Third Circuit**

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

American Iron and Steel Institute, *et al.*, respectfully move this Court for leave to file a brief *amici curiae* in this case in support of the petition for a writ of certiorari filed by Powell Duffryn Terminals, Inc. The petition seeks review of the court of appeals' decision in *Public Interest Research Group of New Jersey, Inc., et al. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990) (reproduced as Appendix A to the petition). Counsel for the petitioner has consented to the filing of a brief *amici curiae* by the American Iron and Steel Institute, *et al.* Counsel for respondents Public Interest Research Group of New Jersey, Inc., and Friends of the Earth did not consent.*

* As reasons for withholding consent, respondents' counsel stated that the brief *amici curiae* was not necessary, that respondents would not be able to reply to *amici*, and that respondents would not object to submission of a brief by *amici* if the Court grants the petition and hears the case on the merits.

1. *Amicus* American Iron and Steel Institute ("AISI") is a trade organization of manufacturers, processors and other producers of iron and steel and related products. All AISI members are regulated under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988) ("Clean Water Act" or "the Act").

Amicus Chemical Industry Council of New Jersey ("CIC") is a trade organization composed of 105 chemical and allied product manufacturers with facilities located throughout the state of New Jersey. CIC member companies produce a broad range of materials used in the agriculture, pharmaceuticals, manufacturing, construction, mining, textiles, flavors and fragrances, precious metals and research. Nearly all of CIC's members are regulated under the Clean Water Act.

Amicus National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of over 13,000 companies and subsidiaries. NAM's members produce over eighty percent of the manufactured goods produced in the United States. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. Thousands of NAM's members and affiliates are regulated under the Clean Water Act.

Amici also include a number of individual companies in chemical production, oil exploration, production, refining and marketing, pharmaceuticals, production of steel and other metal products, tool and heavy equipment manufacturing, food products, mining, electrical equipment and electric utilities. Each of the individual company *amici* are subject to regulation under the Clean Water Act.

2. Like petitioner, each of the *amici* is a holder of (or is an organization many of whose members hold) one or more permits issued under the National Pollutant Discharge Elimination System ("NPDES") established under section 402 of the Clean Water Act, 33 U.S.C. § 1242. These permits are administered by the U.S. Environmental Protection Agency ("EPA") and regulate the dis-

charge of pollutants to navigable waters of the United States. This system of permits is the result of the 1972 amendments to the Act, which required the establishment on an industry-by-industry basis of generally applicable effluent limitations that restrict the types, quantities and concentrations of pollutants that may be discharged. These effluent limitations are enforced through individual NPDES permits. See *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52-53 (1987); *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 203-08 (1976). Section 505 of the Clean Water Act, 33 U.S.C. § 1365, authorizes NPDES permit enforcement in private enforcement actions. This case involves a suit under section 505.

Amici are committed to the goals of the Clean Water Act. To that end and in coordination with state and federal regulatory authorities, *amici* (or member companies) have spent vast sums to upgrade and enhance water pollution control at their facilities. Nevertheless, *amici* (or member companies) have been (or presently are) defendants in enforcement suits under section 505 of the Clean Water Act, or have received notice, pursuant to section 505(b) (1) (A), that an individual or organization intends to file such a suit.

3. The fundamental issue raised by the petition in this case is the scope of the constitutional standing requirements applicable to citizen plaintiffs under section 505 of the Clean Water Act. The court of appeals adopted a new standard for standing in Clean Water Act cases that allows a section 505 plaintiff to establish standing based solely on a showing of a violation of defendant's NPDES permit, without a demonstration that plaintiff's alleged injury was caused by the defendant's conduct.

Amici are directly interested in this case because the court of appeals' misinterpretation of constitutional standing requirements for Clean Water Act citizen suits would greatly expand citizens' entitlement to bring suit under the Clean Water Act, as well as other environmental statutes. In fact, the expansion of traditional constitutional

standing requirements in environmental suits was the predicate given by Judge Aldisert for his concurring opinion below. See 913 F.2d at 84.

The issue raised by the instant petition for a writ of certiorari directly affects *amici* and raises important issues regarding constitutional requirements for standing. This is true not only because *amici* (or their members) are subject to regulation under the Clean Water Act and private enforcement actions under section 505, but also because the court of appeals' decision implicates similar enforcement suits under a number of other environmental statutes. The decision below seriously prejudices *amici* by announcing a standard of broad applicability that would permit litigation by persons who, under the standards previously applied by this Court, would not have standing to sue.

In the accompanying brief *amici* address these broad issues. *Amici* do so from the perspective of diverse organizations and industrial entities whose concerns regarding the decision below transcend this case. *Amici* believe that they can effectively contribute to the Court's understanding of the broader ramifications of the court of appeals' decision.

In view of the foregoing, *amici* American Iron and Steel Institute, *et al.*, respectfully request that they be permitted to file the accompanying brief *amici curiae* in support of petitioner Powell Duffryn Terminals.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-867

POWELL DUFFRYN TERMINALS, INC.,
Petitioner,
v.

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC.,
FRIENDS OF THE EARTH and UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

**BRIEF AMICI CURIAE OF
AMERICAN IRON AND STEEL INSTITUTE,
NATIONAL ASSOCIATION OF MANUFACTURERS,
CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY,
AMERICAN CYANAMIDE COMPANY, BORDEN, INC.,
CHEVRON CORPORATION, THE COCA-COLA
COMPANY, DRESSER INDUSTRIES, INC., HERCULES,
INCORPORATED, JERSEY CENTRAL POWER & LIGHT
COMPANY, MONA INDUSTRIES, INC., MURPHY OIL,
USA, INC., PHELPS DODGE CORPORATION, SANDOZ
PHARMACEUTICALS CORPORATION, SMITHFIELD
FOODS, INC., TYSON FOODS, INC., USX CORPORATION,
UNIVERSAL TOOL & STAMPING CO., INC.
and WARD TRANSFORMER CO., INC.
IN SUPPORT OF PETITIONER**

This brief *amici curiae* is submitted in support of petitioner Powell Duffryn Terminals, Inc. *Amici* believe that the decision below of the court of appeals, *Public Interest*

Research Group of New Jersey, Inc., et al. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990) (reproduced as Appendix A to the petition), incorrectly interprets the requirements for standing under Article III of the Constitution and disregards the decisions of this Court that identify the requirements for constitutional standing.

The petitioner has consented to the filing of this brief and petitioner's letter of consent has been filed with the Clerk of the Court. Respondents Public Interest Research Group of New Jersey, Inc., and Friends of the Earth ("NJPIRG") have not consented, and *amici* have simultaneously filed a motion for leave to file this brief.

1 STATEMENT OF INTEREST OF AMICI

Amici consist of several voluntary business associations and individual companies representing a broad spectrum of industry in the United States.

Amicus American Iron and Steel Institute ("AISI") is a trade organization composed of manufacturers, processors and other producers of iron and steel and related products. Virtually every member of AISI is subject to regulation under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988) ("Clean Water Act" or "the Act").¹ Many AISI members have been defen-

¹ The 1972 amendments to the Clean Water Act establish a permit system, the National Pollutant Discharge Elimination System ("NPDES"), that regulates the discharge of pollutants to navigable waters of the United States. These permits contain effluent limitations restricting the types, quantities and concentrations of pollutants that may be discharged. The permit system is administered by the U.S. Environmental Protection Agency ("EPA"). See § 402 of the Act, 42 U.S.C. § 1342; see also *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52-53 (1987); *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 203-08 (1976). Section 308 of the Act, 33 U.S.C. § 1318, requires an NPDES permit holder to self-monitor compliance with NPDES permit requirements. Monitoring reports

dants in a citizen suit, like the instant case, under section 505 of the Clean Water Act. AISI presents the views of its members on issues of law and public policy which are of concern to them.

Amicus Chemical Industry Council of New Jersey ("CIC") is a trade organization representing 105 chemical and allied product manufacturers with facilities located throughout the state of New Jersey. CIC member companies produce a variety of materials which are used in the agricultural, pharmaceutical, manufacturing, construction, mining, textile, flavor and fragrance, precious metals and research industries. CIC serves as a spokesperson for its members on important issues of local, state and federal policy. Nearly all of CIC's members are regulated under the Clean Water Act and many have been defendants in citizen suits under section 505 of the Act.

Amicus National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of over 13,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers in the United States and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. Thousands of NAM members and affiliates are regulated under the Clean Water Act and many have been defendants in citizen suits under section 505. Like AISI and CIC, NAM presents the view of its members on issues of law and public policy that concern them.

are submitted to the appropriate regional office of the EPA and state environmental agencies, who use these reports in evaluating compliance and determining whether enforcement action is necessary. In addition, these monitoring reports are available to the public. 40 C.F.R. § 122.41(l)(4) (1990). NPDES enforcement by private parties (sometimes referred to as "citizen suits") is authorized by § 505 of the Act, 33 U.S.C. § 1365. This case arises under § 505.

Amici also include a number of individual companies in chemical production, oil exploration, production, refining and marketing, pharmaceuticals, production of steel and other metal products, tool and heavy equipment manufacturing, food products, mining, electrical equipment and electric utilities. Each of the individual company *amici* are subject to regulation under the Clean Water Act and has been (or currently is) a defendant in a citizen suit under section 505, or received notice, pursuant to section 505(b) (1) (A), that an environmental organization intends to file such a suit.

Amici are vitally interested in the issues raised by the petition in this case. In the decision below the court of appeals established a standard for standing in Clean Water Act citizens suits. 913 F.2d at 72. The standard is described as one for environmental cases generally. *Id.* at 84, 89 (Aldisert, J., concurring). The decision of the court of appeals disregards decisions of this Court that identify the requisite elements of standing and, as a consequence, violates Article III of the Constitution. The importance of the instant petition transcends the Clean Water Act and presents issues of vital importance to a number of federal environmental laws.

REASONS FOR GRANTING THE WRIT

Article III of the Constitution limits federal judicial power to cases and controversies. To meet that limitation a plaintiff must demonstrate that it has standing to sue. Specifically, to establish standing to sue litigants must show that they have sustained an injury that is fairly traceable to the defendant's unlawful conduct, that is, "injury in fact" resulting from the action which they seek to have the court adjudicate." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472-73 (1982). In addition to those requirements for injury in fact and causation, the plaintiff must also show that the injury is likely to be redressed by a favorable decision. *Id.*

In the decision below the court of appeals ruled that the plaintiffs had standing to sue. In so ruling the court of appeals announced a new standard for satisfying the causation aspect of standing in Clean Water Act cases. 913 F.2d at 72. Under this new standard the causation requirement is satisfied if a pollutant discharged by the defendant in excess of an NPDES permit limit causes or contributes to the "kinds of injuries" alleged by the plaintiff. *Id.* This standard is a significant relaxation of the causation requirement for standing. *Id.* at 84, 89 (concurring opinion). Influenced by a desire to affirm the district court's imposition of a civil penalty, *see id.* at 84-85, the court of appeals established a precedent that has far reaching implications for expanding standing under the Clean Water Act and other environmental statutes. *See also id.* at 83 (expressing serious concern that decision "will not survive careful Supreme Court review").²

A. The Third Circuit Changes This Court's Substantial Likelihood Standard For Causation Into A Mechanical Test That Makes The Absence Of Evidence Of Causation Irrelevant To Standing

The decision below by the district court on liability ruled that a citizen suit plaintiff satisfies the causation aspect of standing merely by showing a violation of an NPDES permit. *Student Public Interest Research Group*

² Although this new standard for causation was accepted by one member of the Third Circuit panel "only on the most questionable of grounds" and "for purposes of this case," 913 F.2d at 83-84, the decision below announced a broad rule that significantly changes the requirements for satisfying the causation aspect of standing in Clean Water Act cases. *But see Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting):

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

of *New Jersey, et al. v. P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1083 (D.N.J. 1986). A number of district court decisions in Clean Water Act section 505 cases reach the same conclusion. See e.g., *Atlantic States Legal Foundation v. Universal Tool & Stamping Co.*, 735 F. Supp. 1401, 1412 (N.D. Ind. 1990) (causation is presumed if plaintiff shows that defendant violated its NPDES permit); *NRDC v. Outboard Marine Corp.*, 692 F. Supp. 801, 807-08 (N.D. Ill. 1988) (causation is shown by proof of defendant's NPDES permit violations; if more were required the "causation standard would compel a stricter showing for standing than for liability under the Act"); *Student Public Interest Research Group of New Jersey v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1424 (D.N.J. 1985) (defendant would have the court apply a stricter test for standing than for liability itself).³ While seeming to disagree with the rationale of these district court decisions, including the decision of the district court below that a permit exceedance alone is sufficient to satisfy causation, the court of appeals adopted a very similar approach.

Specifically, the court of appeals cited *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978), for the proposition that to satisfy the causation aspect of standing "plaintiffs need only show that there is a 'substantial likelihood' that defendant's conduct caused plaintiffs' harm." 913 F.2d at 72. The court then announced for Clean Water Act cases a three-part test for causation: (1) a pollutant discharge in excess of an NPDES permit limit (2) to a waterway in which the plaintiffs have an interest that is or may be adversely affected and (3) that pollutant causes or contributes to "the kinds of injuries" alleged by the plain-

³ See also *Sierra Club v. Union Oil Co. of California*, 22 ERC 1342, 1344 (N.D. Cal. 1985) ("contrary to defendants' contention, it is not incumbent on plaintiff to demonstrate that its relevant members specifically and causally suffered injury from defendants' alleged violations").

tiffs. *Id.* Further explaining the term “kinds of injuries,” the court of appeals said that if the defendant exceeded its permit limit for a pollutant and that pollutant is present in the waterway, causation is established. 913 F.2d at 73 & n.10.

The court of appeals reasoning is incorrect. The Third Circuit turns the “substantial likelihood” standard that this Court applied in *Duke Power* into a mechanical, litmus paper test for standing. *Duke Power*’s “substantial likelihood” standard is a factual, case-specific standard rather than the generic, formulistic determination suggested by the court of appeals.

The underlying issue in *Duke Power* was the constitutionality of the Price-Anderson Act, 71 Stat. 576 (codified as amended in scattered sections of 42 U.S.C.), which limits liability in the event of a nuclear power plant accident. The plaintiffs were two organizations and 40 individuals, and their standing to sue was challenged. The plaintiffs asserted various kinds of injuries that they would sustain as a result of the operation of nuclear power plants under construction in close proximity to where the individual plaintiffs lived. The plaintiffs maintained that those injuries were causally related to the Price-Anderson Act: there was a substantial likelihood that without the protection of Price-Anderson the construction of the nuclear plants that plaintiffs viewed as threatening would not proceed. *See* 438 U.S. at 72-75.

As applied by the Court in *Duke Power*, the “substantial likelihood” standard is based on case-specific evidence showing a causal connection between the challenged action and the plaintiffs’ injury. *See id.* at 75-77.⁴ This reflects the fact that application of the standards that govern standing is not a mechanical exercise. *Allen v.*

⁴ *See also Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 669 (D.C. Cir. 1987) (the facts must show that the challenged action is at least a substantial factor influencing the injury complained of).

Wright, 468 U.S. 737, 751 (1984). Although determining standing in a particular case may be facilitated by rules developed in prior cases,

[t]ypically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether *the particular plaintiff* is entitled to an adjudication of *the particular claims* asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?

Id. at 752 (emphasis supplied). Moreover, the principles that govern standing to sue do not vary with the circumstances of a given case. *Valley Forge Christian College*, 454 U.S. at 484 ("[W]e know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States"). The court of appeals' decision cannot be reconciled with these principles.

In *Lujan v. National Wildlife Federation, et al.*, 110 S. Ct. 3177 (1990), this Court required a nexus between the location of the injury and the conduct or activity causing the injury. In contrast, here the court of appeals reasoned that any plaintiff establishes standing based on an interest in a given waterway that may be affected by the type of pollutant that the defendant discharged to that waterway in excess of a corresponding NPDES permit limit. Under the court of appeals' new rule for standing in Clean Water Act cases it does not matter how far removed the injury and the challenged conduct may be from each other in distance and time.⁵ Those factors, which

⁵ But see *Oklahoma et al. v. EPA*, 908 F.2d 595, 607 (10th Cir. 1990) (downstream impact of a particular pollution source will become so attenuated as to be non-detectable).

are the essence of causation in the context of this case, are irrelevant to the court of appeals' new rule.

As justification for relaxation of the requirements for standing the Third Circuit implies that evidence of causation would be difficult to obtain because of the large number of parties discharging to an affected waterway. See 913 F.2d at 72 n.8. That suggestion parallels NJPIRG's argument below. See Brief of Appellees-Cross-Appellants at 12 n.8, 3d Cir. Nos. 89-5831, 89-5851, 89-5861 (January 10, 1990) (suggesting the impossibility of identifying the injury resulting from an individual discharge). That is a false issue. Far from being impossible, pollutant tracing with computer modeling has become routine.⁶ In fact, petitioner submitted such modeling evidence at the trial in this case. This evidence, which was unrebutted, showed that there was not a causal relationship between petitioner's discharge and respondents' injury. Petition for Writ of Certiorari at 5 n.3 (No. 90-867). Concluding, however, that requirements for standing may be relaxed in Clean Water Act cases, the courts below did not address that evidence.

In sum, the court of appeals' new rule for standing in Clean Water Act cases contradicts the standards for constitutional standing previously applied by this Court. The consequence is to transform the federal courts into a vehicle for the vindication of the value interests of concerned bystanders. *Allen v. Wright*, 468 U.S. at 756.

⁶ See e.g., *Oklahoma v. EPA*, 908 F.2d at 607 (noting that computer modeling can predict the extent of a discharger's impact on water quality standards); *Marathon Oil v. EPA*, 830 F.2d 1346, 1348-49 (5th Cir. 1987) (EPA used computer modeling programs to analyze a discharger's impact on water quality standards); *NRDC v. Zeller*, 688 F.2d 706, 714 (11th Cir. 1982) (upholding the validity of an inter-agency agreement requiring the use of modeling to analyze water quality impact).

B. The Issues Raised By The Court Of Appeals' Rule For Standing In Clean Water Act Cases Are Important And Recurring And Transcend The Clean Water Act

The court of appeals' new rule for standing in Clean Water Act cases has considerable importance for Clean Water Act litigation and litigation under a number of other environmental laws. *See* 913 F.2d at 84, 89 (suggesting that relaxed standard for standing applies to environmental cases generally) (concurring opinion).

1. Issues concerning the causation aspect of standing are recurring and prevalent in Clean Water Act citizen suit litigation. In connection with the previous reauthorization of the Clean Water Act,⁷ the Senate Committee on Environment and Public Works noted that citizen suits under section 505 had become a substantial portion of Clean Water Act enforcement litigation.⁸ That continues to be the case. EPA has in the past maintained a log identifying notices of intent to file suit under section 505. EPA resumed similar recordkeeping during April, 1990, and EPA's Office of Enforcement and Compliance Monitoring estimates that approximately 120 notices of intent to sue under section 505 were received during the months of April-November, 1990.⁹ The standing-causation issue underlying the court of appeals' decision is a recurring issue in these cases, and a frequent subject of reported (and unreported) district court and court of appeals decisions under section 505.¹⁰

⁷ The Water Quality Act of 1987, Pub. L. 100-4, 100 Stat. 7, (February 4, 1987).

⁸ S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985).

⁹ Telephone interview with Krista Dobby, EPA Office of Enforcement and Compliance Monitoring, Enforcement Division, Washington, D.C. (December 20, 1990).

¹⁰ The issue of whether § 505 plaintiffs have satisfied the causation element of standing has been litigated in a large number of cases. *See Simkins Industries, Inc. v. Sierra Club*, 847 F.2d 1109 (4th Cir. 1988), *cert. denied* 109 S. Ct. 3185 (1989); *Atlantic States Legal Foundation v. Universal Tool & Stamping Co.*, 735

The decision below will serve as a stimulus for increased litigation under section 505. As of December 12, 1990, 84,391 NPDES permits had been issued under the Clean Water Act.¹¹ As noted earlier (*see n.1*), a violation of an NPDES permit's effluent limitations is reported by the permit holder both to EPA and the appropriate state environmental protection agency and made publicly available. These self-monitoring reports are treated as admissions and are generally sufficient to establish a violation of the Act. *See United States v. Ward*, 448 U.S. 242 (1980). As a result, the plaintiff's case is largely made by the defendant, and a section 505 suit may be brought with relative ease. In addition, plaintiffs have considerable incentive to bring these suits because of the opportunity to direct monetary relief resulting from the suits to environmental organizations and section 505(d)'s provision for recovery of attorneys' fees and expenses.¹²

F. Supp. 1401 (N.D. Ind. 1990); *NRDC v. Outboard Marine Corp.*, 692 F. Supp. 801 (N.D. Ill. 1988); *NJPIRG v Jersey Central Power and Light Co.*, 642 F. Supp. 103, 106-07 (D.N.J. 1986); *NJPIRG v. American Cyanamid*, Civil No. 83-2068 (JWB) (D.N.J. November 6, 1985) (transcript of hearing, at 12-13); *Sierra Club v. Kerr-McGee*, 23 ERC 1685, 1687-88 (W.D. La. 1985); *SPIRG v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1200 (D.N.J. 1985); *SPIRG v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1423-24 (D.N.J. 1985); *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1546-47 (D.Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *rev'd*, 484 U.S. 49 (1987); *Chesapeake Bay Foundation v. Bethlehem Steel*, 608 F. Supp. 440, 446 (D.Md. 1985); *NJPIRG v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394, 1397 (D.N.J. 1985); *Sierra Club v. Union Oil of California Co.*, 22 ERC 1342, 1344 (N.D. Cal. 1985); *Sierra Club v. Copolymer, Inc.*, Docket 84-407-B (M.D. La. November 15, 1984) (Transcript of oral argument); *SPIRG v. Anchor Thread Co.*, 22 ERC 1150, 1152-53 (D.N.J. 1984).

¹¹ Telephone interview with Kim Ogden, EPA Office of Water Enforcement and Permits, Permits Division, Washington, D.C. (Dec. 27, 1990) (number derived from internal EPA permit compliance statistics).

¹² A civil penalty of up to \$25,000 per day of violation may be imposed in a § 505 suit. *See* 33 U.S.C. § 1365(a); *see also id.* § 1319(d). In many § 505 cases a significant portion of the mone-

The court of appeals' decision is a stimulus to increase section 505 suits by eliminating the requirement for evidence indicating that injury in fact is fairly traceable. *See* 913 F.2d at 88 (concurring opinion). Simply put, by dispensing with the need for evidence of causation, the court of appeals' decision significantly broadens the universe of potential plaintiffs under section 505, with attendant increases in section 505 litigation in the future, all of which is contrary to the requirements for standing under Article III.¹³

tary relief has gone to environmental organizations. One environmental organization has noted that

[t]hese citizen suit provisions could be utilized by NYPIRG [New York Public Interest Research Group, Inc.] to punish polluters, gain publicity, steer a significant amount of money to worthwhile environmental projects, and conceivably, to bring in money to NYPIRG in the form of legal fees to attorneys and scientific "experts."

Memorandum from Messrs. R. Weiner, *et al.*, to Executive Comm., NYPIRG (July 19, 1986) (Re: Clean Water Act Citizens Suits). *See also* 913 F.2d at 84 (concurring opinion) ("I see PIRG and FOE in the position of the old-time vaudeville performer's ad in *Variety*: 'Have tux, will travel.' PIRG and FOE advertised: 'Have case, need live-bodied members/plaintiffs'").

¹³ An example further demonstrates this point. Approximately 327 NPDES permittees, which includes industrial facilities and publicly-owned treatment works ("POTWs"), discharge wastewater to the Hudson River between Albany and New York City. Telephone interview with Francis Zagorski, Environmental Engineer, New York State Department of Environmental Conservation, Division of Water, Albany, New York (December 27, 1990). In addition, the POTWs (107 of these permittees are POTWs) will typically serve a considerable number of indirect industrial dischargers (indirect dischargers are also subject to suit under § 505). *See NYPIRG v. Limco Mfg. Corp.*, 697 F. Supp. 608, 609 (E.D.N.Y. 1987). Under the Third Circuit's reasoning a plaintiff who is offended by an oily or greasy sheen on the Hudson River in New York City could chose to sue any one of a great number of upstream dischargers who may have violated a permit limit for oil and grease (oil and grease is a commonly regulated pollutant under EPA's industry effluent standards). *See e.g.*, 40 C.F.R. Parts 408, 417, 423, 425, 432, 433, 463, 464, 468 and 471. This is true no matter how geographically re-

2. The Third Circuit's relaxation of constitutional standing requirements in this case has implications far beyond Clean Water Act citizen suits. Like section 505 of the Clean Water Act, a number of other environmental statutes also authorize private enforcement. This includes section 304 of the Clean Air Act, 42 U.S.C. § 7604 (as amended by section 707 of the Clean Air Act Amendments of 1990, Pub. L. 101-549); section 310 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659; section 326 of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046; section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972; and section 20 of the Toxic Substances Control Act, 15 U.S.C. § 2619(a)(1). Each of these provisions authorizes "any person" to commence a civil action against an alleged violator of the underlying environmental statute. The Third Circuit's relaxation of constitutional standing requirements for Clean Water Act citizen suits could be applied to a broad range of similar actions brought under other environmental statutes, permitting plaintiffs to file suit based solely on generalized notions of harm, without proof of causation.

Section 304 of the Clean Air Act exemplifies this concern. This statute has recently been amended to authorize civil penalty relief in citizen suit enforcement. *See* Pub. L. 101-549, § 707(a).¹⁴ Under the court of appeals' reasoning an individual located perhaps hundreds of miles from a source of air emissions would have standing to maintain a suit under section 304 if the air emissions source exceeded its permit limit for a given pollutant

mote the permittee is from the injury complained of and despite the absence of evidence that the injury is causally linked to the discharger.

¹⁴ Title V of Pub. L. 101-549 establishes a permitting program that will apply to many sources of air pollutants. The new permit program is modeled after the Clean Water Act's NPDES permit program. *See* S. Rep. No. 228, 101st Cong., 1st Sess. 373 (1989).

which also happens to be the same type of pollutant that affects ambient air quality in the plaintiff's locality. See 913 F.2d at 72. It would not matter that the presence of the pollutant of concern in the plaintiff's locality was not causally related to the defendant's actions. That is the necessary result of the Third Circuit's reasoning.

In sum, the decision below establishes a rule for standing in Clean Water Act cases that is at odds with the standards previously applied by this Court in resolving issues of constitutional standing. The court of appeals' decision will transcend the Clean Water Act and improperly increase litigation under a number of environmental statutes.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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POWELL DUFFRYN TERMINALS, INC.,

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TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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Article III	2, <i>passim</i>
Statutes:	
Section 505 of the Federal Water Pollution Control Act	2, 7
Other Authorities:	
Wright, Miller & Kane, <i>Federal Practice and Procedure: Civil 2d</i> , §1917 (2d ed. 1986)	3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

POWELL DUFFRYN TERMINALS, INC.,

Petitioner,

vs.

PUBLIC INTEREST RESEARCH GROUP OF NEW
JERSEY, INC., FRIENDS OF THE EARTH and UNITED
STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

Petitioner, Powell Duffryn Terminals, Inc., respectfully submits this reply brief in support of its Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

REASONS FOR GRANTING THE WRIT

1. INTERVENTION BY THE EPA DOES NOT CURE THE JURISDICTIONAL DEFECT WHICH HAS BARRED THIS SUIT FROM ITS OUTSET, NOR DOES THIS INTERVENTION REMEDY THE ERRONEOUS RULE FOR STANDING ESTABLISHED BY THE COURT OF APPEALS

The United States Environmental Protection Agency ("EPA") received notification in March, 1983 of plaintiffs' intention to file suit under §505 of the Federal Water Pollution Control Act ("FWPCA" or the "Act"). A-51.¹ EPA however did not initiate suit against Powell Duffryn ("PDT") under the Act, nor during the ensuing six years did EPA intervene in any proceedings before the district court. When the case reached the court of appeals in 1989, EPA intervened on the limited issue, which is not related to this Petition, of "whether the district court exceeded its jurisdiction by reducing a civil penalty, and then diverting the reduced penalty from the federal Treasury to an environmental trust fund." *Ral*. Such intervention in the court of appeals does not cure the jurisdictional defect in the district court resulting from respondents' lack of standing. Respondents' argument to the contrary in its opposition brief is not a viable contention.

Because Article III limits the power of a federal court to entertain an action, standing must exist at all stages of the proceeding, including the time when the complaint was filed. Cf. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). See also, *Safir v. Dole*, 718 F.2d. 475, 481 (D.C. Cir. 1983) ("Standing, since it goes to the very power of the court to act, must exist at all stages of the proceeding. . ."), cert. den. 467 U.S. 1206 (1984). Respondents must have had standing to pursue this litigation at the time

¹ "A-51" refers to page 51 of the joint appendix filed in the court of appeals. "Ra_____" refers to the appendix to this reply brief. "____a" refers to the appendix to Powell Duffryn's Petition for a Writ of Certiorari.

they filed their complaint, for if they did not, the district court was without Article III jurisdiction to enter its judgment, and that judgment accordingly may not stand.²

Further, it is equally well established that intervention cannot cure a jurisdictional defect that would have barred the federal court from hearing the original action. In fact "[by] its very nature intervention presupposes pendency of an action in a court of competent jurisdiction. . . ." *Black v. Central Motor Lines, Inc.*, 500 F.2d. 407, 408 (4th Cir. 1974). " 'An existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit. . . . ' " *Id.* citing *Kendrick v. Kendrick*, 16 F.2d. 744, 745 (5th Cir. 1926)

In *Roberts v. Carrier Corporation, et al.*, 117 FRD 426, 428 (N.D. In. 1987) the court, citing Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d*, §1917 (2d ed. 1986), added that, " 'Intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action.' " Instead if jurisdiction "is lacking at the commencement of the suit, it cannot be aided by . . . intervention." *Pianta v. H.M. Reich Co., Inc.*, 77 F.2d. 888, 890 (2d Cir. 1935). See also, *Pressroom Unions, Etc. v. Continental Assur. Co.*, 700 F.2d. 889, 893 (2d Cir. 1983), cert. den. 454 U.S. 845. Hence intervention cannot create jurisdiction where it otherwise is absent. *Jacobs v. District Director of Internal Revenue*, 217 F.Supp. 104, 106 (S.D. N.Y. 1963).

² The facts of this case make especially apparent that EPA's intervention does not relieve respondents from their obligation to establish Article III standing. EPA has never addressed the merits of respondents' claim, but rather intervened solely to address the propriety of the district court's reduction of the civil penalty and the diversion of the penalty to an environmental trust fund. Respondents alone pursued the claim that petitioner had violated the Federal Water Pollution Control Act, and the district court's jurisdiction to enter judgment on that claim depended solely on respondents' standing to raise it. Respondents stipulated, moreover, that their standing is to be based on the record, in support of standing, as of the district court's order of January 13, 1986. Ra2 (A-615, excerpt from pre-trial order).

In *United States Ex. Rel. Texas Portland Cement Company v. McCord*, 233 U.S. 157, 163 (1913) plaintiffs filed suit prematurely under the terms of the "act of February 24, 1905 (c. 778, 33 Stat. 811)" (hereafter the "Act"). Thus the court lacked jurisdiction. Although the "bill was prematurely filed," one party (named Illingsworth) intervened within the statutorily permitted time period for initiating suit, which commenced six months after accrual of the claim. Justice Day wrote for the Court.

"As to the intervention of Illingsworth, in which it is claimed, other creditors' claims were incorporated . . . we fail to see that this mends the matter.

* * *

These rights to intervene and to file a claim, conferred by statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit."

The act of intervening does not, therefore, confer jurisdiction where none previously exists. In the cases cited by respondents, the courts acquired jurisdiction at the outset of the cases through the original parties. These cases are therefore inapposite to this case. Subject matter jurisdiction must exist at the time the action is commenced. *Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d. 241, 245 (9th Cir. 1988) cert. den. 488 U.S. 1006 (1989).

Respondents' contrary argument — that jurisdiction is established in the district court through EPA intervention at the appellate level six years after suit was started, and after final judgment was entered — is fundamentally flawed. EPA intervention in the court of appeals does not relieve respondents from their burden to establish Article III standing. *U.S. Ex Rel Texas, etc., supra*.

2. THE COURT OF APPEALS IMPROPERLY CREATED A SPECIAL EXCEPTION TO ARTICLE III'S STANDING REQUIREMENTS FOR CITIZEN PLAINTIFFS IN CLEAN WATER ACT CASES, AND THIS ERRONEOUS RULE OF LAW REQUIRES REVERSAL

Respondents claim that the court of appeals' decision "follow[s] the well-established law of this Court . . . [and involves] the application of correct principles of law to a particular factual situation . . ." Opposition Brief at page 22 (hereinafter "Opp. Br. ____"). This is incorrect. Under the Third Circuit's new rule for standing in "Clean Water Act case[s]," evidence that a defendant did not cause or contribute to the injury complained of by a citizen-plaintiff has become legally irrelevant. *PIRG, et al. v. Powell Duffryn Terminals, Inc.*, 913 F.2d. 64, 72 (3rd Cir. 1990) (14a). Causation now is established, as a matter of law, simply by showing that a pollutant has been discharged in excess of an NPDES permit limit, and that the pollutant may cause or contribute to the "kind" of injury alleged by plaintiff, even if plaintiffs' members recreate at a location which is far removed from the discharge. This holding constitutes relaxation of Article III's standing requirement for causation and redressability, and improperly establishes a special exception, for environmental cases, to these constitutional limits on citizen standing.

The error of the Third Circuit's new test for standing, where defendant does not in fact cause or contribute to the actual injuries alleged by plaintiffs' members, but where standing is nonetheless upheld, is shown clearly in the record in this case. Powell Duffryn produced expert testimony at trial that, to a reasonable scientific certainty, its discharge did not cause or contribute to plaintiffs' members' alleged injuries. A-2018 to 2020. Sworn affidavits by LeRoy Sullivan, an expert in environmental engineering, and Allen Dresdner, a professional planner, further attested not only that PDT's discharge neither caused nor contributed to plaintiffs' alleged injuries, but also that the source of those injuries was downstream from Powell Duffryn. 3k-4k, 2(1)-4(1). In fact the record additionally shows that the segment of the Kill Van Kull into which PDT discharges exhibited *none* of the characteristics about which plaintiffs' members

complained. 2(1), 2m. Unrebutted sworn affidavits attested that Powell Duffryn "is not the source" of plaintiffs' alleged injuries. 3k. To the court of appeals, however, this proof was irrelevant, 914 F.2d. at 72, and the court was unequivocal in this regard: "In a Clean Water Act case" causation is now to be established without evidence that defendant's conduct is in actuality a cause of plaintiffs' alleged injuries. 14a. See *contra*, *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Indeed under the Third Circuit's decision, "[c]onjectural or 'hypothetical' " causation is now the legal standard on which to find and uphold standing. But see, *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

No decision by this Court or another court of appeals sanctions the Third Circuit's substantial relaxation of Article III's requirements for standing. Rather, the court of appeals' new rule contradicts the specific factual inquiry to determine standing required by this Court in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) and *Allen v. Wright*, 468 U.S. 737, 751 (1984). In its place, the court has established a formulaic test to determine if a citizen-plaintiff, in a Clean Water Act case, has standing. Proof by a defendant that it did not contribute to plaintiffs' injury has been rendered immaterial.³

³ Respondents are incorrect when they argue that the "court below proposed no new criteria for . . . any . . . requirement of standing." Opp. Br. 9-10, 20. The court clearly did so and, in fact, it is this very relaxation of Article III standing by the court that is the predicate given by Judge Aldisert for his concurring opinion —

"Throughout my extensive preparation of this case . . . I was persuaded that the member/plaintiffs had failed to show an actual injury that was fairly traceable to the permit violations (41a) . . . I find standing here only on the most questionable grounds — a belief that somehow the Supreme Court might be inclined to relax its stringent requirements of standing in environmental cases (42a) . . . What troubles me from the testimony is any indication that the injury-in-fact was fairly traceable." 53a. 913 F.2d. at 83-84, 88.

Respondents' argument that the court merely applied "correct principles of law to a particular factual situation" mis-casts the precedent-setting decision of the Third Circuit. Opp. Br. 20.

This broad rule for standing adopted by the Third Circuit significantly changes and expands the causation and redressability aspects of standing in §505 cases, which is precisely what the court of appeals intended to achieve because, under this Court's rules for standing, respondents' members otherwise lacked the requisite elements of causation and redressability. The record showed that PDT's discharge did not cause or contribute to plaintiffs' alleged injuries, and respondents admitted having no facts regarding the effects of PDT's discharge on the Kill Van Kull. 2j. Indeed, respondents lack of "causation evidence" was underscored by their expert (Dr. Bruce Bell), on whom they rely in their opposition brief (Opp. Br. 17). Dr. Bell testified during cross-examination at trial that —

"Q. [By PDT] Now, neither in your report nor in your analysis of Powell Duffryn's history at the site did you evaluate the impacts of Powell Duffryn's discharge on the Kill Van Kull or any receiving waters, did you?

A. [By Dr. Bell] No. I did not." A-1487.

In his deposition Dr. Bell admitted additionally that he did not "know anything at all about the Kill Van Kull . . . [on which to] form an opinion whether Powell Duffryn's discharge has caused [or will cause] an adverse effect . . ." A-1221 to 1222.

In addition Dr. Bell testified further that he did *not* "know of any facts on which to base an opinion that Powell Duffryn's discharge, either now or in the past, has caused or contributed to and/or otherwise has been related to any change in dissolved oxygen in the Kill Van Kull." A-1230. What he concluded — and what respondents base standing on — was that,

"Q. [By PDT] So all you know is that if you put something in a body of water, there is potential for an impact, but whether that ever happened in Powell Duffryn's case, you don't know.

A. [By Dr. Bell] That's correct." A-1216.

Confronted with facts demonstrating that PDT's discharge was not the cause of the conditions on which respondents based their standing (and thus that plaintiffs lacked standing), the court of appeals chose to relax traditional standing requirements to permit suit without proof of causation. The court of appeals accepted respondents' legal position, which respondents repeat to this Court, that establishing standing under the Clean Water Act "*requires no such showing.*" See Opp. Br. 13, n.6. That is, evidence that the discharge at issue caused or contributed to the injury alleged is not required. *Id.* at 14 (arguing that a permit exceedance which generally "contribute[s] to the polluted condition" of a waterway establishes causation).⁴

Hence, under the Third Circuit's decision, if a permittee discharges a pollutant which might cause the "kind" of injury a plaintiff complains about — even if in the case at bar the permittee in fact has not contributed to that injury — then Article III causation is nonetheless deemed satisfied as a matter of law. This new legal standard has substantial adverse implications. Although Powell Duffryn is located miles from where respondents' members recreate, respondents claim that because these watercourses are "tidally connected," causation flows from

⁴ Respondents argue erroneously that, without such a rule for standing, it would be "impossible" to show causation and that "no plaintiff [including EPA] could bring enforcement actions against polluters." Opp. Br. 20. This is clearly erroneous. Proof of causation has become standard, through expert testimony such as by Mr. Sullivan, an environmental engineer, and/or pollutant tracing by computer modelling. See e.g., *Oklahoma v. EPA*, 908 F.2d 595, 607 (10th Cir. 1990) (noting that computer modelling can predict the extent of a discharger's impact on water quality standards); *Marathon Oil v. EPA*, 830 F.2d 1346, 1348-49 (5th Cir. 1987) (EPA used computer modelling programs to analyze a discharge's impact on water quality standards); and *NRDC v. Zeller*, 688 F.2d 706, 714 (11th Cir. 1982) (upholding the validity of an inter-agency agreement requiring the use of modelling to analyze water quality impact).

Further, respondents fail to appreciate a fundamental aspect of the law of standing in arguing that the United States is subject to the same limitations as are citizen plaintiffs. Opp. Br. 20. Unlike a citizen plaintiff, the federal government's standing to enforce the Act derives from Article II of the Constitution — the duty to faithfully execute and enforce federal law.

a discharge anywhere along the waterways. Opp. Br. 14. The court of appeals has adopted this standard. Thus, under the Third Circuit's test for causation, an industrial facility located many miles to the north on the Hudson River is equally susceptible to suit if it has discharged "O&G" (oil and grease) in excess of its permit limit. There is no point of attenuation under the Third Circuit's decision.⁵ No linkage is required between defendant's conduct and the actual injury alleged. This indeed is a new test for standing. Under it, there is no "principled basis" to differentiate among permittees. *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 472 (1982).

This Court's principles for standing are, however, directly to the contrary. In *Lujan v. National Wildlife Federation*, 110 S.Ct. 3177 (1990) the Court has required that citizen-plaintiffs identify the site of their alleged injuries, *and* the connection if any between defendant's conduct and impacts at that site. Respondents failed in these proofs, and to accommodate that omission the court of appeals relaxed Article III and crafted a new test for "Clean Water Act cases" 913 F.2d. at 82, (14a). Causation however does not flow inexorably with the tides. The Third Circuit's decision in *Powell Duffryn* is an erroneous controlling precedent on causation and redressability, and it should be reversed.

⁵ Yet it is clear that the downstream impact of a particular pollution source will become so attenuated as to have no effect on water quality. See *Oklahoma, et al. v. EPA*, *supra*, 908 F.2d. 595, 607 (10th Cir. 1990).

CONCLUSION

Petitioner submits that for the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

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**CORRESPONDENCE TO THE COURT
FROM THE OFFICE OF THE SOLICITOR GENERAL**

**U.S. Department of Justice
Office of the Solicitor General**

Washington, D.C. 20530

December 7, 1990

Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Powell Duffryn Terminals, Inc. v.
Public Interest Research Group of New
Jersey, Inc., et al.*, 90-867

Dear Mr. Spaniol:

A petition for a writ of certiorari was filed by Powell Duffryn Terminals, Inc., on November 30, 1990. It presents the single issue of whether an environmental organization had demonstrated standing to sue in this case.

The United States Environmental Protection Agency was permitted to intervene before the Third Circuit Court of Appeals and therefore is named as a respondent in this Court. However, our intervention was sought, and granted, only on the issue of whether the district court exceeded its jurisdiction by reducing a civil penalty, and then diverting the reduced penalty from the federal Treasury to an environmental trust fund. We never raised, or briefed, the standing issue now presented by the petitioner. Accordingly, we do not intend to file a response to the petition unless requested to do so by the Court.

Sincerely,

Kenneth W. Starr
Solicitor General

EXCERPT FROM PRE-TRIAL ORDER (A-615)

Plaintiffs' Standing

1. The parties do not agree whether plaintiffs have standing in this case. Defendant moved to dismiss the case for lack of standing on or about December, 1984 and plaintiffs submitted five affidavits in support of their standing. Those affidavits were executed by Sheldon Abrams, Melissa Van Ditti, Douglas MacNeil, Andrew Gerbino and Cheryl Cummings. By Order dated January 13, 1986, the Court determined that plaintiffs have standing. All rights of appeal in this regard have been preserved by defendant.

2. Without waiving defendant's right to appeal this Court's order of January 13, 1986, with regard to defendant's challenge to plaintiffs' standing, in order to avoid the need for the testimony of individual members of the citizen-plaintiff organizations at the trial on relief, the parties stipulate that plaintiffs will not present testimony on the issue of plaintiffs' continued standing in this case at the trial on relief. The parties further stipulate that, if plaintiffs had standing to maintain this action at the time of this Court's order of January 13, 1986, then plaintiffs continue to have standing at the time of the trial on relief in this matter and that, if plaintiffs lacked standing at the outset of this case or at the time of the Court's Order of January 13, 1986, then plaintiffs also lack standing at the time of the trial on relief in this matter.

3. This stipulation as to standing does not relate to the issue of mootness, if any.

